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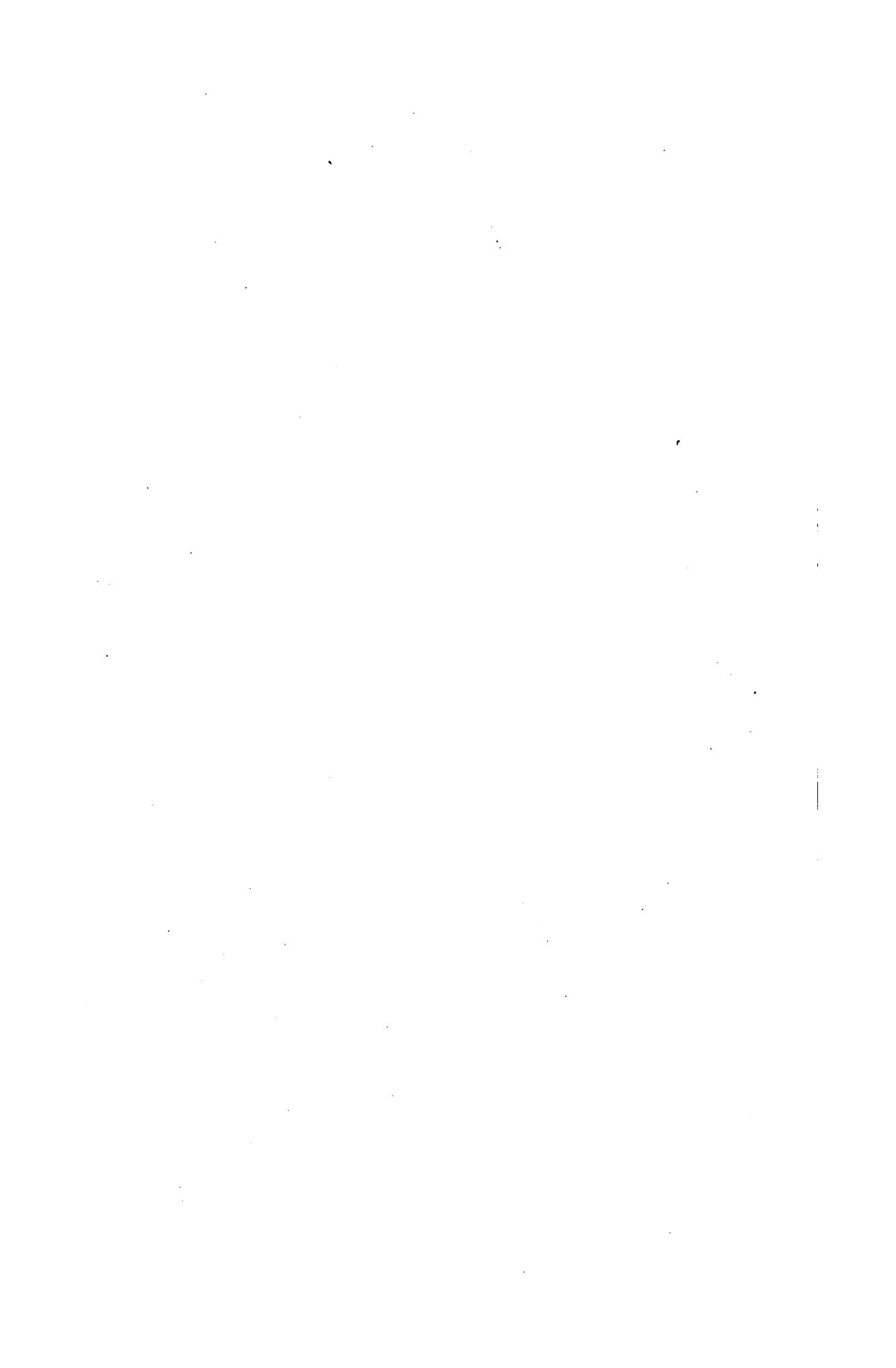
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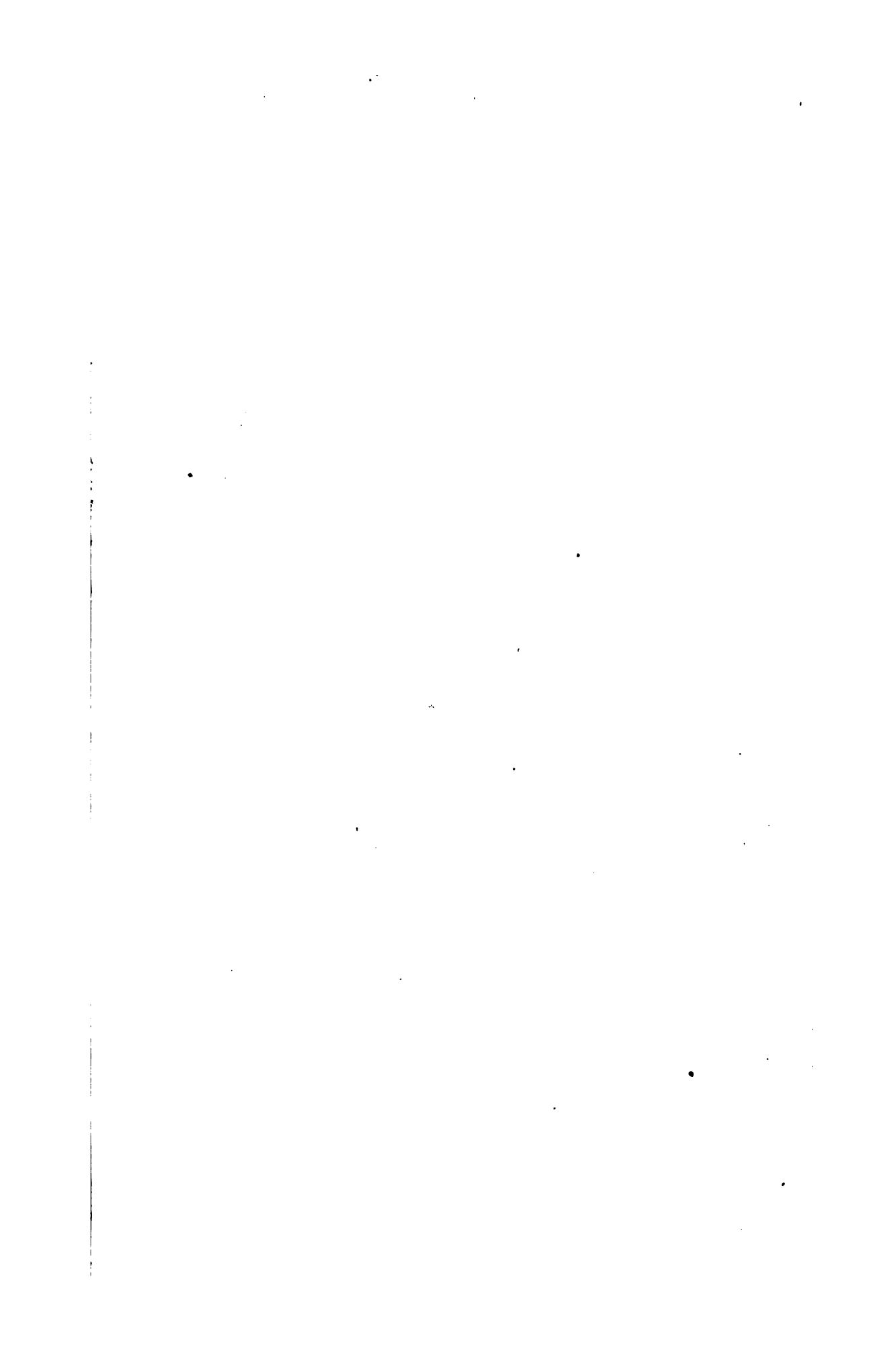
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REPORTS OF CASES

RELATING TO

INSOLVENCY.

BY

D. C. MACRAE AND C. J. B. HERTSLET, ESQRS.,

BARRISTERS-AT-LAW.

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INSOLVENCY CASES.

INSOLVENT DEBTORS' COURT.

October 19, 1847.

(Before MR. COMMISSIONER HARRIS.)

Protection Case.

In Re HENRY JOHN MEWBURN.

Practice—Counsel.

Counsel's right to sole audience in this Court extended to all cases under the Statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.

THIS insolvent appeared for his interim order.

Lewis, of the firm of Lewis and Lewis, was about to direct the attention of the Court to the informal nature of the proceedings, but was interrupted by

MR. COMMISSIONER HARRIS, who intimated that, in the face of a bar of qualified practitioners, regularly practising in that Court, an attorney could not be heard as an advocate. That rule he then laid down, and it was founded upon the deliberate opinion of the whole Court, that counsel had the right of sole audience. It had been the established practice for five-and-twenty years, and there was no intention to allow it to be broken through under the transferred jurisdiction. If any persons objected to the determination of the Court to persevere in this practice under the protection statutes, they could easily set them right by *mandamus*.

Lewis said that he had regularly instructed counsel, of whose services he had been unexpectedly deprived. Under the circumstances, perhaps the Court would grant him indulgence to state, not as an advocate, but for the information of the Court, certain objections apparent upon the face of the proceedings.

*Re H. J.
MEWBURN*

*Re H. J.
MEWBURN.*

MR. COMMISSIONER HARRIS.—Oh, certainly. My only object in interfering was, to lay down the rule in the very first case that occurred.

Lewis pointed out various objections to the petition and schedule, which were stated more fully by counsel upon a subsequent day, to which the case was

Adjourned. (a)

INSOLVENT DEBTORS' COURT.

October 26, 1847.

(Before MR. COMMISSIONER HARRIS.)

In Re HENRY JOHN MEWBURN.

Practice—Amendment—Rent due.

The Court has no power to amend the petition under the 7 & 8 Vict. c. 96. Rent due to a Landlord excluded in construing the word "unincumbered" in the allegations in the petition respecting an Insolvent's Estate.

*Re H. J.
MEWBURN.*

THIS insolvent appeared, pursuant to adjournment, for his interim order.

Dowse opposed the insolvent for Messrs. Faudel and Phillips. He submitted that the blanks in the insolvent's petition were not properly filled up, and that the allegation that his estate was "unincumbered" was untrue.

The insolvent, in examination, admitted that he had paid his attorney 4*l.* on the 21st of September, and 1*l.* on the 24th of September, the day he signed his petition.

Dowse said, that the 5*l.* paid to Mr. Knuckey, his attorney, had been put down in his special balance sheet, but it had not been filled in according to the truth in the blank left for that purpose in the petition. He referred to that paragraph, which was in this form: "That your petitioner has not parted with or charged any of his property, except for the necessary support of himself and his family, and the necessary expenses," and then follows a blank, "(not exceeding £—) of this his petition," which must be filled up according to the circumstances of the case. If no money had been paid to

(a) An intimation that opposition can only be made by the creditor in person or by counsel appearing for him is now appended to every notice of hearing served upon creditors under the protection statutes.

*Re H. J.
MEWBURN*

the attorney, it should have been so stated, but if 5*l.*, or any other sum, was paid, it was the insolvent's duty to have the blank filled up according to the truth. It had not been done in this petition, and the omission was an error which the Court had not the power to amend, as the Court would see by referring to the second section of the Act (7 & 8 Vict. c. 96), which enacts, that "every petition for protection from process shall be in the form specified in the schedule hereunto annexed (A. No. 1), and such petition shall be verified by an affidavit of the petitioner in the form specified in the schedule hereunto annexed (A. No. 2), and if such petition and affidavit shall not be in the form herein prescribed such petition shall be dismissed."

Thomas (contra) said, that as words were construed generally, the words of the statute did not refer to some small error of a small amount. It would be ridiculous to say, that if the insolvent had paid five farthings instead of five pounds to his attorney it would be a fraud to have it omitted.

MR. COMMISSIONER HARRIS said, that suppose he had paid 50*l.* instead of 5*l.* to his attorney and had omitted to state it, the principle would be the same.

Thomas said, in that case it would be for the Court to consider whether it was done fraudulently.

MR. COMMISSIONER HARRIS.—Oh, no.

Thomas.—Is the whole proceeding to be annulled from the ignorance of a clerk, or the error of an insolvent? The statute could not have intended that a mere frivolous objection should be sustained. The blank was not wilfully, nor intentionally, omitted to be filled up.

MR. COMMISSIONER HARRIS said that he would consult the Chief Commissioner.

Dowse then referred the Court to another paragraph in the petition in support of his second objection: "That your petitioner is desirous that his estate should be administered under the protection and direction of this Honourable Court, and he verily believes such estate is of the value of 193*l.* at the least, unincumbered, and that the same is available for the benefit of his creditors." The insolvent says that his estate is unincumbered, which would lead to the idea that there was no claim on the property, but the landlord had a claim of 45*l.* for three quarters' rent. He submitted that property was not unincumbered. The broker of the Court would take that property subject to the claim of the landlord, so that it was clearly not property unincumbered to the extent which the insolvent had said. It was stated in the estate paper, first, that it was worth 193*l.*; then, that sum was run through, and 15*l.* substituted in its place, which was subject to the claim of the landlord. That allegation in the petition he submitted was false; that sum was not available for the creditors.

Thomas.—Supposing the landlord did not come in when the rent was due, technically that allegation in the petition was most correct.

*Re H. J.
MEWBURN.*

MR. COMMISSIONER HARRIS said, that, in reference to that point, he had consulted Mr. Commissioner Law, and they were of opinion that the word "unincumbered" in the petition did not mean such a liability as accrued by operation of law, but a charge or incumbrance created by an act of the insolvent.

Nichols (amicus curiae) said that the word "incumbrance" meant an actual charge on the property, not a liability.

Cooke (amicus curiae) said that the mere power of the landlord to put in a distress was not an incumbrance. A man might truly say that his property was unincumbered, although he might owe a debt upon which he might be sued.

MR. COMMISSIONER HARRIS intimated that he would consult the Chief Commissioner upon the first objection in reference to filling up the blank in the petition which the insolvent had omitted. Upon his return into Court he intimated his concurrence with the Chief Commissioner in thinking that the omission to fill up the blank in the petition with the £1 paid to the attorney was fatal. The petition would therefore be

Dismissed.

Rule as to filling up the Blanks in the Petition.

MR. COMMISSIONER HARRIS said that, as a great number of practitioners were present, it was proper to mention this point of practice, that the blanks in the petition must be filled up, not with figures, but with words at length. That was the more necessary, as the amount in figures occurred again, and to prevent, as far as possible, technical objections.

INSOLVENT DEBTORS' COURT.

October 22, 1847.

(Before MR. COMMISSIONER HARRIS.)

In Re JOHN M'GREGOR.

Ground of Opposition—Practice—Inaccuracies—Assignees.

Obtaining the forbearance of a debt by false pretences, although stated to be a ground of opposition by the Act of Parliament 1 & 2 Vict. c. 110, s. 78, ruled not to be so according to the practice of the Court. Inaccuracies in the General Balance Sheet are not fatal and may be amended. Assignees are appointed ordinarily after an insolvent's discharge.

DUNCAN opposed and *Cooke* supported the insolvent. *Duncan* said that his ground of opposition to the insolvent's discharge was, that he had obtained from his client the forbearance of a debt by false pretences.

*Re JOHN
M'GREGOR.*

MR. COMMISSIONER HARRIS said that that ground of opposition had been in the Act of Parliament for twenty years, but it had never been acted upon. He did not intend to sanction any alteration in the practice. (a)

Duncan submitted that, if that ground of opposition were overruled, he would show that the statements in the insolvent's general balance sheet were incorrect.

MR. COMMISSIONER HARRIS said that it was no part of the schedule, and was not sworn to. The general balance sheet was merely intended to give some general notion of the quantity of property that had come into an insolvent's hands and his income, with the mode of expending it during the period of his embarrassments. At the same time, he observed that it did not appear to be quite consistent with some of the statements in the schedule. It must therefore be amended, and the case would stand adjourned for that purpose. (b)

Duncan applied for the appointment of a creditor as assignee.

MR. COMMISSIONER HARRIS replied that the rule of that Court was not to appoint an assignee till after an insolvent's discharge, unless some very special circumstances should render the appointment of an assignee necessary at an earlier period.

Application refused.

(a) Where an insolvent has gained time by false and fraudulent representations, by which the proceedings in an action for the recovery of a debt were stayed, and the opportunity employed to make away with property, Mr. Commissioner Law has held such a case to come within this provision of the Act of Parliament.

(b) The general balance sheet, although only intended to be a general statement, must be true, and not repugnant to, or inconsistent with, the representations in the schedule.

INSOLVENT DEBTORS' COURT.

October 26, 1847.

(Before MR. COMMISSIONER HARRIS.)

*Protection Case.**Re WILLIAM SPINK.**Trader Debtor—Statute 7 & 8 Vict. c. 96—Sets-off.**Sets-off are allowable in diminution of the total amount of the Debts of a Trader Debtor, to bring him within the operation of the Statute 7 & 8 Vict. c. 96.**Re WILLIAM SPINK.***N**ICHOLS was instructed by a Loan Society, Cooke appeared for the insolvent.

The insolvent appeared for his interim order on the 19th of October, when the Commissioner, discovering that the debts of the insolvent, who petitioned as a trader debtor, were only reduced below 300*l.* by sets-off on the other side of the account, expressed some doubts whether the petition could be entertained. After hearing some observations from counsel he consulted Mr. Commissioner Law, and, finding that there was some difference of opinion upon the point, the insolvent's case was adjourned to allow time for fuller consideration.

The insolvent came up to-day, pursuant to the order of adjournment.

MR. COMMISSIONER HARRIS observed that this case must form a precedent for a very material and important point, namely, whether sets-off can be admitted in reduction of the total amount of an insolvent trader's debts, so as to bring him within the words of the statute as "owing debts amounting in the whole to less than 300*l.*" As far as the principle was concerned, it was immaterial whether an insolvent trader's debts amounted to 300*l.* or 3,000*l.*, so long as he was able, by means of sets-off, to reduce the amount below the maximum limit allowed by the Act of Parliament.

Cooke said that he was prepared to sustain the proposition, that a man might petition as a trader owing debts less than 300*l.*, although the fact that the debts did not exceed that amount should be ascertained by admitting sets-off of good debts. He would first address himself to the principle. Undoubtedly a man might be said to owe a certain sum of money, provided that upon his side of the account he had nothing to set off as against his creditor; but if the creditor was *bonâ fide* indebted to him, he ought, both in equity

Re WILLIAM SPINK.

and in justice, to be allowed to set that debt off in reduction of his own account, and he could only fairly be said to be indebted for the difference. The Act of Parliament must be construed partly with reference to its provisions and partly with reference to the law of bankruptcy. That was a very important point. The interpretation of the Act was to be governed by the law and practice of bankruptcy. In the construction clause it was enacted, that the provisions of the Act should be construed by analogy to the law of bankruptcy, except where otherwise expressed. Therefore, when, upon a question of this kind, doubts were entertained about the construction to be put upon the words of the Act, these doubts must be cleared up by ascertaining what was the existing law in bankruptcy. That would be found by referring to the Act 6 Geo. 4, c. 16, s. 50, which provided that "where there has been mutual credit given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the Commissioners shall state the account between them, and one debt or demand shall be set against another, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand hereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy committed." Therefore, it was quite plain that, in a case in bankruptcy, reference must be made to the actual state of the account, as taken equitably between the bankrupt and his creditors. The next point was, that they must be such a class of debts as might be set off by the statute 2 Geo. 2, c. 22, s. 13. The amount of the insolvent's debts, as taken under the 7 & 8 Vict. c. 96, must therefore be ascertained by a reference to the law of bankruptcy, and the admissibility of sets-off by a reference to the Act relating to sets-off. If a creditor went to prove in bankruptcy, the first question would be,—how stands the account between you and the bankrupt? And the next question would be,—is your debt included in the class of debts that may be set off? The bankrupt would be answerable only for the balance, and no more. The law of bankruptcy was to govern the interpretation of the word "debt," and, as the amount of debt due was ascertained in conformity to the statute to which he had alluded there, so the same practice should prevail here. The next point to show was, that they were debts which, by law, they were entitled to set off. He contended that they belonged to that class of debts, and might fairly and properly be set off.

MR. COMMISSIONER HARRIS intimated that the case might proceed.

Cooke examined the insolvent in proof of the sets-off.

Nichols declined to argue the case of jurisdiction. There were assets to be divided, and the creditors thought it most beneficial to sustain the petition.

Re WILLIAM SPINK.

MR. COMMISSIONER HARRIS said that he would grant the interim order of protection, but his mind was not yet fully satisfied upon the point.

Cooke said that sets-off were permitted by some of the Commissioners in Bankruptcy under this Act of Parliament, to his personal knowledge.

MR. COMMISSIONER HARRIS said that no cases were cited, only a newspaper report.

Cooke rather took it as a case of *prima impressionis* here.

The Court fixed the insolvent's appearance for his final order on the 20th of November. On that day

MR. COMMISSIONER HARRIS said that this was the case in which the point occurred with respect to sets-off,—a question which had been much discussed by the Commissioners, and respecting which they had, he believed, come to an unanimous decision, namely, that when sets-off were relied upon in order to reduce the total amount of debts below 300*l.* there must be produced substantial evidence of the *bonâ fide* nature of the sets-off pleaded in diminution of the aggregate amount of debts. That would certainly be the rule for the future. Under the circumstances of this case, and as the petition was sustained by creditors, they gave the insolvent a *locus standi* in Court, but it was not to be drawn into a precedent in future.

The Court appears to have exercised considerable caution in determining upon the question as to the admissibility of sets-off in diminution of a creditor's claim, so as to bring him within the jurisdiction of this Act of Parliament. The learned counsel, in argument, strictly confined himself to the law and practice in Bankruptcy which is to guide in all cases of doubt. He might, however, have referred to the case of *Austin v. Debnam*, 3 B. & C. 139, as bearing strongly upon, if not being decisive of, the point. There it was held that where there are mutual dealings between two parties and items known to be due on each side of the account, an arrest for the amount of one side of the account, without deducting what is due on the other, is malicious and without probable cause, and subjects the party to an action for a malicious arrest. The Court considered the balance only as the just debt. The Lord Chief Justice Abbott says, in pronouncing its judgment, "I am of opinion upon the construction of the statute of set-off, that where there are mutual accounts, the balance only is to be considered as the existing debt for the purpose of arrest." And it has been well observed by Mr. Paterson, that it is difficult to conceive any satisfactory reason for a different holding, where it is not for the purpose of arrest, but to bring a person within the provisions of an Act, the object of which is declared to be to give protection to persons who have become indebted *without fraud or culpable negligence*, so as that their estates may be duly distributed, and which Act is to be construed in the most beneficial manner for the promoting of the ends intended by it. Therefore it appears that, independently of the Bankrupt Acts, an insolvent trader might well pray in aid sets-off to bring him within the provisions of this Act of Parliament.

INSOLVENT DEBTORS' COURT.

March 29, 1844.

(Before MR. COMMISSIONER HARRIS.)

Re WILLIAM HIGGINS.*Bail—Practice.**If a creditor may become bail for an insolvent.*

THIS insolvent applied to be admitted to bail. *Re*
W. HIGGINS
Pike, detaining creditor, objected that one of the bail tendered was a creditor.

MR. COMMISSIONER HARRIS said that when a creditor offered to become bail, it was, in his opinion, a proof rather that the insolvent was a man who might be trusted. *Bail allowed.*

INSOLVENT DEBTORS' COURT.

March 29, 1844.

(Before MR. COMMISSIONER LAW.)

Re GEORGE JENVEY.*Bail—Practice.*

It is not absolutely necessary that the bail in all cases should be double the amount of the judgment debts.

THIS insolvent applied to be admitted to bail, and sureties were tendered to the amount of 500*l.* *Re*
GEORGE
JENVEY.

Nichols prayed to have the sureties enlarged.

Cooke supported the application and stated the merits.

MR. COMMISSIONER LAW said that in all cases he did not require bail to double the amount of the judgment debts; he exercised a discretion; in some cases he required a great deal more, and in others less. Upon the merits, the bail tendered in this case was amply sufficient. *Bail allowed.*

Note.—In Cooke's Insolvency Practice, p. 159, it is stated that “the Court will, upon a view of the schedule, and an examination of the insolvent (if necessary), determine the amount of the recognizance; but although no rule has been made upon the subject, yet it may be understood that it will be generally taken in double the amount of the detaining creditor's debts.” This statement of the learned author is correct as far as it goes, though scarcely definite enough. The practice of all the Commissioners, with the single exception of Commissioner Law, is to require bail to justify to double the amount of the detaining creditor's debts. Upon a late occasion Commissioner Phillips refused to deviate from this practice, although Lewis, attorney, pressed upon his notice the dictum of Commissioner Law.

INSOLVENT DEBTORS' COURT.

June 14, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS, and Mr. COMMISSIONER PHILLIPS.)

*Re F. HALFACRE.**Remand—Vexatious Defence—Costs of Opposition.**In adjudging a remand for the vexatious defence of an action, the Court will take into consideration that a form of action less expensive than that chosen might have been selected.**Practice as to allowing the costs of oppositions under statute 1 & 2 Vict. c. 110.*

Re
 F. HALFACRE. **T**HIS insolvent was opposed by *Nichols*, for having vexatiously defended an action. He was supported by *Creswell*.

From the evidence it appeared that an action had been brought in *assumpsit* on the balance of an account, and on two bills of exchange, and for goods sold amounting to 34*l.* 15*s.* The costs were 28*l.* 10*s.* In consequence of the plea put in, they were increased by 11*l.* or 12*l.* If the action had been brought in debt, the increased costs in consequence of the plea would have been 6*l.* or 8*l.* less.

Tegg, attorney, on being questioned by the Court as to his reason for bringing the action against the insolvent in the most expensive form, said that it was the rule in his office to bring *assumpsit* for all sums above 30*l.*

The CHIEF COMMISSIONER said, that every case of this sort was a case of *degrees*. They could not throw out of the case the mode in which this creditor had instituted these proceedings, and therefore, after deducting the 6*l.* excess in consequence of the form of action chosen from the 16*l.* extra costs, that would leave 10*l.* for which the insolvent would be remanded for two months and one week.(a) In this case, upon the question of costs, the Court stated what the practice was as to allowing the costs of opposition.

The CHIEF COMMISSIONER said, the law was this:—Under the description of offences specified in the 77th section the opposing creditor, if he succeeded, was entitled to his costs; but if the offence was under the 78th section (1 & 2 Vict. c. 110), the allowance of costs was in the discretion of the Court. The distinction was this, and it was obvious:—the offences under the first-named section were general cases, while those under the second-named section were individual cases, and in those cases the attorney did nothing generally, but relied upon the complaining creditor to

(a) The insolvent had given no instructions to plead, but only a general retainer to his attorney to act for him in the cause.

make out his case, and then he asked for the expenses of that particular creditor. In reference to those cases, he might state the rule of the Court in the words of one of his learned brothers, "The payment of costs in individual cases of opposition must be the exception and not the rule." *Re*
F. HALFACRE.

INSOLVENT DEBTORS' COURT.

January 7, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS, and MR. COMMISSIONER PHILLIPS.)

Re FRANCIS WALL.

Vexatious Defence—Evidence.

In oppositions for vexatiously defending actions, as the expense constitutes the offence, the bill of costs and the Master's allocatur must be produced.

THIS insolvent was the country traveller and agent of Mr. *Re*
WALL. Clifton, a deceased wine-merchant of Token-house-yard, London. He had accepted certain bills for his employer, who had given them in payment to a Mr. Laforest, by whom (upon the death of Mr. Clifton) an action was brought against the insolvent for the amount of the bills. He obtained a verdict for the full amount claimed, including noting and interest, amounting to 610*l.* 7*s.*

The insolvent having pleaded to the action, was opposed by *Nichols*, upon the ground of a vexatious defence.

Kirkman, attorney, gave in evidence the record in the action; but to save his client further expense, he had not had the costs taxed, although he affirmed that they amounted to above 100*l.*, and, indeed, no bill of costs was produced.

Dowse objected that such evidence was inadmissible. It was necessary to produce, not only the bill of costs, but the Master's *allocatur*, to show the amount at which the costs had been taxed. This was the more necessary, as the action was tried in the country (Maidstone), and an attorney's notion of costs was often of a very enlarged character.

Nichols replied.

The CHIEF COMMISSIONER said that the ground of opposition in these cases was thus stated in the words of the statute (1 & 2 Vict. c. 110, s. 76), "If any such prisoner shall have put any of his creditors to any unnecessary expense, by any vexatious or frivolous

*Re FRANCIS
WALL.*

defence or delay to any suit for recovering any debt or sum of money due from such prisoner." The offence was the expense, and certainly in ninety-nine cases out of a hundred that expense was attested by the officer of the Court in which the action was brought, competent to decide upon the subject, and we take that (the Master's *allocatur*) as the test. But the offence is not the putting in such and such pleas; the offence is the expense. As for this gentleman (Mr. Kirkman) saying that it would cost a good deal to tax the bill, if he has not thought fit to prosecute his suit to the utmost, and has not even made out a bill, he cannot complain if he does not succeed. No doubt he adopted what he thought was the prudential course; but when a party comes here, and the insolvent is to be affected by the statute, we must see that it is strictly adhered to.

MR. COMMISSIONER PHILLIPS said, that the power of the Court was to be exercised upon certain data,—that is, the difference proved between the costs upon taxation and what they would have been if the action was undefended. If that was not so, solicitors would differ as to the proper amount of costs, and they would have no certain data upon which to proceed in fixing the period of remand.

The attention of the Court was here directed to Cooke's Practice, p. 216, which states, that the expense "may be shown either by the Master's *allocatur*, if the costs have been taxed, or *by the evidence of the plaintiff's attorney, if they have not been taxed.*"

Dowse said, if that it was so, it would be admitting evidence of a very dangerous character indeed; for when an attorney made out his bill of costs, he might put in every possible charge, and every expense which he imagined he had a right to claim. That is not a case in which he can himself be allowed to be a judge, and that was more especially the case at the assizes, where the expense was always more considerable.

MR. COMMISSIONER PHILLIPS.—Where no bill of costs has been made out at all, are we to take the evidence of a solicitor? He should rather think that it was a reason for rejecting the evidence altogether.

The CHIEF COMMISSIONER said that the great difficulty in such a case as this was how to fix the length of the remand. Should they send the insolvent back for six weeks or three months? How could they know? There was no bill made out. They had not had an opposition for years where a remand was sought under such circumstances.

Nichols said that a solicitor could state the extra expense caused by pleading. He submitted whether the rule might not be reconsidered.

The CHIEF COMMISSIONER said that it might be argued again fully if required.

MR. COMMISSIONER PHILLIPS inquired if an instance was ever known in which the Court acted penal in a case of this kind, where a bill of costs had not been made out.

Nichols being unable to produce a case in point, Mr. COMMISSIONER PHILLIPS said that he thought if such evidence was admitted, it would be necessary for the Court to act upon the capricious opinion of every solicitor who might be brought to give evidence on the subject.

Re FRANCIS WALL.

The objection was sustained, and the opposition on that ground disallowed.

INSOLVENT DEBTORS' COURT.

August 4 and 11, 1843.

(Before the CHIEF COMMISSIONER REYNOLDS, and COMMISSIONERS HARRIS and POLLOCK.)

Re CHARLES JAMES JOHNS.

Former Insolvencies—Property Dividend.

An insolvent had been discharged by the Insolvent Debtors' Court upon several occasions. Property was realized under one of the schedules. Held, that the assets were to be applied in discharge of the claims of all the creditors in all the schedules.

THIS was an application under the 89th section of the 1 & 2 *Re CHARLES JAMES JOHNS.* Vict. c. 110, which enacts, "That in case any person or persons, body politic or corporate, shall, after any such insolvent shall have become entitled to the benefit of this Act by any such adjudication as aforesaid, become or be possessed of, or have under his or their power or control, any stock in the public funds of this country, or any legacy, money due or growing due, bills of exchange, promissory notes, bank notes, securities for money, goods and chattels, or any other property whatsoever belonging to such insolvent, or held in trust for him, or for his use and benefit, &c., it shall be lawful for the said Court, upon the application of any assignee or creditor of such insolvent, to cause notice to be given to such person or persons, body politic or corporate, directing them to hold and retain the said property in his or their possession till the said Court shall make further order concerning the same." The insolvent had taken the benefit of the Act upon two previous occasions. He had won from Lord W*** at play a sum of 1,200*l.* after which he set off to Brussels. His lordship deposited the money with an agent in London for transmission to the insolvent. A creditor in the schedule of the insolvent, filed by him when he first took the benefit of the Act, heard of the fact, and applied to the Court for, and obtained, the usual order, calling upon Mr. Noreutt, by whom the money was to be transmitted to

*Re CHARLES
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the insolvent, *to hold and retain* the same until the further order of the Court. A rule was obtained at the same time calling upon Mr. Norcutt and the insolvent "to show cause why the sum of money in the hands of Mr. Norcutt, or such other sum as the Court shall think fit," should not be paid over to the assignee of the estate and effects of the insolvent. To this rule the insolvent showed cause, and the Commissioner (Pollock) decided that a sum of 417*l.* should be paid into Court to the account of both the estates of the insolvent. To this order an objection was raised in the provisional assignee's office that the order emanated upon a motion made by a creditor under the first estate, and could not be complied with, inasmuch as the creditors under the second estate had not moved in the matter, neither did it appear that they had notice of the proceedings. Another question was also raised as to the division of the money. The creditors under the first estate claimed a priority of payment. Notice was ordered to be given to the creditors in the second schedule, and the question raised for argument.

January 20, 1844.

THE case of *Barton v. Tattersall*, 1 Russell & Mylne, p. 237, and 2 Russell & Mylne, p. 541, had been referred to on a previous day, and

Woodroffe, on behalf of the creditors under the second insolvency, contended, that the doctrine laid down by Sir John Leach in that case was confirmed afterwards by the Master of the Rolls (Lord Langdale) in the case of *Ward v. Painter*, 2 Beavan, 85, and afterwards by the Lord Chancellor upon appeal (4 Jurist, 1,005); that it was consequently the law at that day applicable to this case, and must therefore govern it. If so, then, as in the case of *Barton v. Tattersall*, so in this also, the last set of creditors ought to be paid first. He also contended that if the Court ordered the creditors in the first schedule to be paid first, the creditors under the second schedule should endeavour to obtain their rights by filing a bill in Equity, and the money already paid into Court would be frittered away in costs, to the detriment of all parties to both estates; and he finally contended that this Court had no power to over-rule the decision of a superior Court.

Cooke (contra), said that of course every person would be disposed to treat the decision of a competent tribunal with proper respect. It was not his intention to impugn the doctrine laid down in *Barton v. Tattersall*, or the authority of that case; on the contrary, he had no doubt that that case was rightly decided; but it must be remembered, that it was a decision with reference to a particular Act of Parliament, the 53 Geo. 3, c. 102, s. 14, which enacts that after a reasonable allowance for the maintenance of such debtor and his family, and after payment of his or her debts contracted subsequently to such discharge, or to which such discharge did not extend, application might be made to the Court against such

debtor who was of ability to pay his debts. Therefore there was no ground for the decision in that case; for the Act itself directed that all debts contracted by the insolvent after his discharge should be paid before the scheduled creditors. Stat. 1 Geo. 4, c. 119, s. 25, enacted that where any order for the discharge of any prisoner shall be made, the Court may also order that a judgment shall be entered up against such prisoner in some one of the superior Courts at Westminster, &c., that in all the cases the general principle prevailed that debts afterwards contracted should be paid before the scheduled creditors. In all the cases where a Court of Equity had been applied to, the party was deceased, and they were marshalling the assets. If an insolvent was living, a Court of Equity would not interfere, but the application must be to this Court. But this Court, it was contended, could not divide the funds between the creditors under two schedules, it must be governed by the particular statute under which the insolvent petitioned. Money obtained by the exertion of a particular creditor under one schedule could not be divided with creditors under another schedule. The assignees of No. 1 could not be the assignees of No. 2; but every assignee was the assignee of the insolvent, under the schedule to which he was appointed. The 89th section of 1 & 2 Vict. c. 110, directed the manner of proceeding, where, after the discharge of a prisoner, any person should be possessed of stock in the public funds, &c. belonging to him. It was by that section enacted, that in case any person or persons, body politic or corporate, shall, after any *such insolvent* shall have become entitled, &c. by such adjudication as aforesaid, become possessed, &c., it shall be lawful for the said Court, upon the application of *any assignee or creditor of such insolvent*, to cause notice, &c. to hold and retain until further order, &c. The words *such insolvent* and *such assignee or creditors* referred to the particular schedule under which the insolvent was discharged, or the party became a creditor.

The CHIEF COMMISSIONER.—Under any one of six insolvencies, do you mean to say that if a fortunate creditor discovered property it must be paid to the co-creditors of such fortunate creditor, and not to any of the other five?

Cooke.—Yes; that is what I contend.

MR. COMMISSIONER POLLOCK.—Suppose three judgments, and all entered up, would not the Court, under the 89th section, be justified in dividing the funds under three schedules?

Cooke.—No; the whole spirit of the Act, I contend, is isolation; the Act has only reference to one case. The A. B. of 1841, and the A. B. of 1842, are distinct persons. The after-acquired property of an insolvent, under No. 1, cannot be divided under schedule No. 2. When the Act uses the words "*such insolvent*," it means under a particular schedule, for it says "*any creditor of such insolvent in such schedule*" and "*such judgment*," and it means under *such schedule*. He then referred to the 62nd section as showing how the dividend is to be made amongst the creditors of such prisoner whose debts are admitted in the schedule.

Re CHARLES JAMES JOHNS.

*Re CHARLES
JAMES JOHNS.*

The CHIEF COMMISSIONER.—This is a new and important question for the consideration of the Court; it will give its judgment next Monday week.

January 29, 1844.

The Court this day delivered its judgment.

The CHIEF COMMISSIONER said,—The insolvent in this case has been twice discharged; viz., on the 30th January, 1839, and on the 9th December, 1841. Mr. Curlewis, a creditor in the first schedule, applied to the Court in the course of last summer that a large sum about to be remitted to the insolvent might be retained by the party in possession of it; and on the 28th of September last, the insolvent appeared on the hearing of the pending rule, when the Court ordered the sum of 417*l.* to be paid into Court, subject to the payment of certain costs, which order has been complied with. William Sands, a creditor inserted in both schedules (but whether in the latter for a portion of the former debt, arising out of his having taken up a bill of exchange subsequently to the former discharge, in which case it would be a portion of the debt in the former schedule, or for a newly contracted debt, does not appear,) was appointed assignee under the first schedule at the time of the insolvent's discharge in January, 1839, but has never taken out his appointment; but no sub-assignee has been appointed under the second schedule. Judgment was entered up on the warrant of attorney, executed under the first discharge, on the 27th November, 1843; but no judgment has been entered up on the warrant of attorney on the second discharge. The case now comes before the Court on an application for the distribution of the sum in Court; and in the course of the argument four modes of distribution have been suggested; viz., first, that the sum in Court should be applied exclusively in discharge of the debts in the first schedule, and that such debts should be paid in full before any amount of future assets ought to be applied to the discharge of the debts in the latter schedule. Secondly, that the application of the money should be in discharge in full of the debts in the latter schedule in preference to the former, and before any assets should be applied to the former. Thirdly, that a distribution of the money should be made rateably amongst all the creditors of the insolvent under both schedules without distinction; for which purpose the Court should divide the sum into two proportionate parts, and allot one of such parts for distribution under each schedule; and, Fourthly, that the whole money should be divided amongst the creditors in that schedule to which Mr. Curlewis, the creditor who originally applied to the Court upon the subject, happens to belong. No case has been cited at the bar in support of any of these modes of distribution except the second, in respect of which the case of *Barton v. Tattersall*, 1 Russell & Mylne, p. 237, was relied

on. That was a case where Jacobs, an insolvent, had been twice discharged under the 53 Geo. 3, c. 102, amended by the 54 Geo. 3, c. 23. Under those two Acts the insolvent on his discharge entered into a recognizance to the full amount of his debts which might be put in suit under the direction of the Court, limited by the 14th section of the 53 Geo. 3, which required that in considering the ability of the insolvent to spare any future acquired property, provision should be made for the maintenance of himself and family, and the payment of debts subsequently contracted, or to which the discharge did not extend; and the 17th section, which relates to deceased insolvents, expressly provides that before any assets should be applied to the payment of debts from which a discharge has been obtained, the order to be made should be such as should be just, but without prejudice to the demand of any other creditor or creditors of the deceased prisoner, *all* of which should be *first* paid and satisfied. Jacobs had died leaving property, and the case came before the Master of the Rolls, entirely on a question whether the Court of Chancery had jurisdiction, and whether the application should not have been made to this Court. The decision was in favour of the jurisdiction, and it therefore followed that a direction should be given to apply the assets, when, as it seems, quite incidentally, the Master of the Rolls directed the creditors under the second schedule to have the money until fully paid, to the entire exclusion of the first creditors, and made his order accordingly. But the mode of distribution was not made a point in the case between the parties, and had not in the most distant manner been alluded to in the argument. Under the next Insolvent Act that was passed, viz., the 1 Geo. 4, c. 119, the directions as to appropriating future assets are very different from those in the 53 Geo. 3; for the 25th section of the 1 Geo. 4, c. 119, provides for the execution of a warrant of attorney, upon which judgment is to be entered up; and if it shall appear to the satisfaction of the Court that a prisoner is of ability to pay the debts from which he has been discharged, or any part thereof, the Court may permit execution to be taken out upon the judgment, or put in force against the future property for such a sum as the Court shall order; such sum to be rateably distributed among the creditors. The present Insolvent Act, 1 & 2 Vict. c. 110, s. 87, follows precisely the words of the 1 Geo. 4, c. 119, s. 14. There is nothing in the judgment of the Master of the Rolls, in the case cited, to show the ground on which he directed the distribution in the first instance amongst the creditors in the latter schedule. It may be that as he found that the 53 Geo. 3, c. 102, expressly provided for the prior payment of debts contracted subsequent to the discharge, he might consider that the debts contracted since the first discharge (although the subject of a second discharge) were under those words of the 14th section bound to be first provided for, and for which there appears some ground; or it may be that, having decided that the Court of Chancery had original jurisdiction in the matter, he directed the mode of distri-

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bution quite irrespective of the Insolvent Act under which he was not sitting; for the Insolvent Act appears to us to be exclusively the law of this Court, and must regulate our own proceedings, but does not bind any other Court which has any jurisdiction over insolvents under other statutes, or by virtue of its own constitution. The case of *Ward v. Painter*, 2 Beavan, 85, cited as supporting *Barton v. Tattersall*, turns also entirely on the question of jurisdiction, and therefore does not apply here, though it may be remarked in passing, that the printed report of Lord Lyndhurst's judgment in the *Jurist*, vol. 4, p. 1,005, expressly recognizes the jurisdiction of this Court, while confirming the decision that the Court of Chancery had original jurisdiction also. We therefore are of opinion that the mode of distribution ordered in the case of *Barton v. Tattersall* does not affect the question now before the Court, and that under the present Act the second mode of distribution above mentioned is not that which ought to take effect; nor can we think that there is any ground for the fourth mode suggested, for it is impossible to see any reason why the accident of a creditor of an insolvent, who has been repeatedly discharged, happening to hear of or discover the possession of available assets, should entitle the creditors in the schedule to which such creditor belongs to have a distribution of such assets exclusively among them; although such schedule may be neither the first nor the last, but an intermediate one. Such a construction would lead to much inconvenience, and is destitute of any settled principle, and therefore, we think, cannot be entertained. It then remains to consider whether the distribution shall begin with the creditors in the earliest schedule, and be applied until they are all paid in full before the later creditors have any share, as in the first mode above mentioned, or whether the Court shall divide the amount and apportion a share to each body of creditors, so that every creditor shall have a similar amount of dividend upon the debt due to him in whichever schedule he may stand, as in the third mode of distribution above mentioned. We have given this subject much consideration, and we are all of opinion in favour of the latter mode. The Legislature, from the first establishment of this Court in 1813, contemplated the repeated discharges of the same insolvent, as is clear from the 52nd section of the 53 Geo. 3, c. 102, which prevents a second discharge within five years of a former one, except under certain limits. In the statutes which have passed from time to time, the directions have naturally been given as if there was only one discharge; but as every succeeding discharge is attended with the same formalities of warrant of attorney, judgment, &c., it is clear that the provisions respecting one schedule may and ought to be applied to each, unless there was an express provision on the subject to the contrary. Had there been any difficulty before, the 121st section of the 1 & 2 Vict. c. 110, would remove it; and all former powers being continued to the Court under former Acts, so far as discharges under those Acts require the continuance of those powers by the 23rd section,

we are of opinion that in the exercise of those powers we should now have the assistance of the 121st section. The case now before the Court, however, is entirely under the 1 & 2 Vict. c. 110, and considering that the spirit of the Act looks to the general body of creditors, and that in section 87 we find it provided that as to future assets the application may be made to the Court by any assignee or creditor of an insolvent, and that the assets, when obtained, are to be for the general benefit of the creditors of such insolvent, entitled to claim under such judgment entered up by order of the Court as aforesaid, that is, entered up as directed in the former part of the same section; we have only to apply to this clause the 121st section, and read the word "judgment" in the plural, according to the fact, and the spirit of the Act, as it appears to us, is carried into full effect. We cannot entertain the question of isolation as contended for at the bar. There is unquestionably isolation as far as keeping the estates of different individuals distinct from each other; but we can see no reason or convenience to arise from carrying the argument of isolation so far as to distinguish between the several discharges of the same individual under the Act, especially as the effect would be to contravene what appears to us to be the obvious intention of the Insolvent Act, that any distribution of subsequently acquired property should inure, in the words of the Act, to the general benefit of the creditors of such insolvent. It is of no material importance that judgment has not yet been entered up on the second warrant of attorney, that of 1841. That proceeding cannot take place without funds, and it is always delayed till there are means of paying for so doing; but when done, the judgment operates *nunc pro tunc*. The result, therefore, of this case will be, that the provisional assignee shall report to the Court what dividend the sum now in his hands will be competent to pay among all the creditors of both the schedules after defraying the costs of the judgment under the second schedule; and what portion of the money, therefore, should be appropriated under the schedule of 1839, and what portion under the schedule of 1841, when the Court will make its order accordingly.

Note.—My own full note of this important case having been partly destroyed, I have been mainly indebted to the MSS. of my learned friend, Mr. Creswell, the Examiner of the Court, who has also kindly furnished me with a copy of the written judgment delivered by the Court.—*Reporter.*

The case of *Re Wright* was ordered to stand for judgment upon the same day as that of *Re C. J. Johns*—the question to be decided was the same. A sum of money had been paid into Court and there had been three insolvencies. It was directed to be distributed in the same way, amongst all the creditors, and this is now the principle recognized and acted upon by the Court in ordering the distribution of the proceeds of property acquired subsequently to an insolvent's discharge, and paid into the hands of the provisional assignee.

*Re CHARLES
JAMES JOHNS.*

INSOLVENT DEBTORS' COURT.

November 23, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re WILLIAM HOUSTON URQUHART.**Uncertificated Bankrupt.**Held, that an uncertificated bankrupt may be discharged under the Insolvent Act.*

Re WILLIAM HOUSTON URQUHART. **T**HIS insolvent had been a bankrupt. All the debts in his schedule had been proved under the fiat. He said that his reason for not having applied for his certificate was want of means. The insolvent, after examination, was *Discharged.*

Note.—Re S. R. Toms. March 13, 1844. This insolvent applied to be admitted to bail till the day appointed for his hearing. It transpired that he had been a bankrupt, and had not obtained his certificate. The CHIEF COMMISSIONER REYNOLDS (after consulting Mr. Commissioner Harris) said that he might be admitted to bail under strict investigation as to the validity of the sureties.—*MS.*

The Court refuses to adjudicate where an insolvent, who is also a bankrupt, has had his certificate suspended for a limited period by the Court of Bankruptcy, until the period of suspension has expired; but if that Court refuses to grant a certificate, which is a judgment involving a decision equivalent to a determination not to entertain his case at all, the Insolvent Debtors' Court considers that, inasmuch as a man ought not to lie in prison, or live in fear of imprisonment for ever, it is bound to hear the case and pronounce a definite adjudication.

THE FOLLOWING IS A RECENT DECISION IN POINT:—

December 1, 1847.

(Before MR. COMMISSIONER PHILLIPS.)

*Re GEORGE FELTHOUSE.**Bankrupt—Suspension of certificate.*

Can a bankrupt, whose certificate is suspended by the Court of Bankruptcy for a limited time, be relieved by this Court?
Held, that this Court will not interfere.

Re GEORGE FELTHOUSE. **T**HIS insolvent had been in prison since March, 1846. He had been declared a bankrupt; and in September last, upon applying for his certificate, it was suspended for three years. He had filed his petition in this Court on the 8th of December, 1846; and he this day applied for leave to file a schedule.

Dowse, in support of the application, referred to the 40th section of the 1 & 2 Vict. c. 110, in which he contended there was an express provision for the Court to deal with an uncertificated bankrupt. The words of the section were these: “ That where

the order vesting the estate and effects of any such prisoner in the provisional assignee of the said Court, in pursuance of the provisions of this Act, shall be or become void by reason of such prisoner being declared bankrupt within such period as above mentioned, or being an uncertificated bankrupt at the time of such order, the said order shall nevertheless, together with the petition of such prisoner, if any, remain of record in the said Court; and the said Court shall and may require such prisoner to file his schedule, and shall *and may cause such prisoner to be brought up to be dealt with according to this Act:* and all things to be done thereupon or preparatory thereto, as in other cases, according to this Act." The words "uncertificated bankrupt" gave the Court jurisdiction to grant the application.

*Re GEORGE
FELTHOUSE.*

MR. COMMISSIONER PHILLIPS said, that this man was not an uncertificated bankrupt. He was under the sentence of the Court of Bankruptcy, which had placed him under its ban. He was adjudicated upon. He had no *locus standi* in Court till the three years were expired, when he supposed he would get his certificate. To grant that application would render null and void proceedings in the Court of Bankruptcy altogether.

Douse said, there was not anything in the Bankrupt Act to prevent this Court hearing a prisoner who had filed a petition, and whose certificate had been suspended for a limited period. In fact, the 40th section made it an imperative duty upon this Court to order the prisoner to file his schedule, and to order him to be heard. It was true that an adjudication by this Court would discharge the prisoner from the debts he owed under the bankruptcy proceedings, but the control over the property belonging to the prisoner would still be left in the Court of Bankruptcy.

MR. COMMISSIONER PHILLIPS said, that the section only applied to cases in which there was no adjudication by the Court of Bankruptcy. The case of this man had received an adjudication.

Douse referred to the marginal note to the clause, "Order to be filed, although avoided by commission of bankruptcy, and Court shall proceed to hear and adjudicate as in other cases."

MR. COMMISSIONER PHILLIPS said, that it was clear, from the whole wording of the clause, that it referred to an inchoate state of things in bankruptcy.

Douse pointed out the words, "or being an uncertificated bankrupt, the said Court shall and may require such person to file his schedule."

MR. COMMISSIONER PHILLIPS repeated that he was more than an uncertificated bankrupt. He was refused his certificate for a certain time, at the end of which time he was told he would get it. He was under sentence of the Court of Bankruptcy. That was a different position from being refused his certificate altogether. He was sorry that the man was in prison, but the Court of Bankruptcy had thought fit that he should suffer, and this Court could not interfere.

Application refused.

INSOLVENT DEBTORS' COURT.

November 23, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re RICHARD PETTY.**Friendly Arrests.*

Are friendly arrests sanctioned by the Court under the 1 & 2 Vict. c. 110; and, if so, under what circumstances?

Held, that friendly arrests are sanctioned where they are resorted to on the one side for obtaining the debtor's liberation from custody, and on the other for the purpose of giving the creditors his property.

Re RICHARD PETTY.

THIS insolvent came up for his hearing. The learned counsel for the opposing creditor examined the insolvent, and it appeared that his father-in-law, a Mr. Taylor, had got possession of his property to the exclusion of the other creditors. He had then thrown him into prison to enable him to take the benefit of the Act.

The CHIEF COMMISSIONER asked the attorney for the insolvent if he could cure the original vice of this case. It was clear from the examination that it was a friendly arrest. He had better consult with the insolvent's father-in-law, and see if he was disposed to do anything in this case. He could not be allowed to keep all the property to the exclusion of the other creditors. The best thing for him would be to give up the property or pay a certain sum of money into Court. He might as well tell him that the only case in which the Court would sanction a friendly arrest was, when on the one side it was for the purpose of obtaining the debtor's liberation from prison, and on the other for the purpose of giving the creditors his property; but in a case where one creditor, a relative, got all the property, it could not be sanctioned.

The CHIEF COMMISSIONER finally adjourned the case for a week, to see whether some terms could not be agreed upon. The insolvent ought to give something from the wreck of his property as the condition of obtaining his liberation. His father-in-law was not to have all his property. That was out of the question. Did insolvents suppose that it was to be a law all on one side—that there was to be a preference solely for the insolvent and his family, and that the creditors were to get nothing?

November 30, 1847.

To day it was stated that an offer had been made by the insolvent, and declined by the creditors.

Dowse, on their behalf, said, that the insolvent had offered the creditors the worst of his two places of business. Taylor, his father-in-law, had the lion's share. He took all the property, and wished the creditors to be content with a worthless place of business.

The insolvent said, that the house and fixtures of the place of business at Rotherhithe, which would be given up, cost him 120*l.* and he had refused 100*l.* for them three months ago. The other place of business was the last resort of himself and family, and he had nothing else to look forward to.

Dowse said, that the circumstances of the case were exceedingly curious. Taylor took a bill of sale from the insolvent, entitling him to property that might at any time be found upon the premises, but it was never acted upon, as it was on unstamped paper. The father-in-law subsequently sued him, and he consented to a judge's order, under which the property was taken. The insolvent was then put into prison, for the purpose of relieving him from the pressure of the rest of the creditors. The best way was for the father-in-law to give up the property, and let it be divided equally amongst the creditors.

The CHIEF COMMISSIONER said, that the case had better stand over for some time, for the insolvent and his father-in-law to have a little conversation. A wild notion had got abroad, because of the infinite indulgence of the law passed in late years, that therefore that Court in administering that Act of Parliament would support all friendly arrests. It was true, that since the passing of the recent Insolvency Acts, the practice in regard to friendly arrests had not been so stringent as it was formerly, but it should not be supposed that they should be supported without any adequate reason being made apparent. It should be generally known that a friendly arrest would never be supported unless there was something for the creditors. If something was given for the creditors, then the Court would sustain it; but if not, the insolvent must wait till some other creditors molested him. He was sure that he represented the opinions of his learned brothers, when he repudiated the wild notion that that Court would sanction a friendly arrest without a commensurate advantage to the creditors. The learned Commissioner observed (addressing the insolvent's father-in-law), you may have said I have got what I want and now I will liberate my son-in-law from the claims of his other creditors by throwing him into prison; but this Court will not sustain such a proceeding.

Mr. Taylor said, that all he received was 51*l.* and he had bought the things for the family of five children.

The CHIEF COMMISSIONER said, before I set the insolvent at liberty, I must have something for the creditors. I am not blaming your feelings in one point of view; but justice must be done.

No other offer being made to the creditors,

The Court remanded the insolvent for six months under the 76th section.

INSOLVENT DEBTORS' COURT.

January 5, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

*Protection Case.**Re NICHOLAS SYMONS.**County Court Judgments.**Circumstances under which the Court will refuse to grant an insolvent protection against County Court judgments.**Re NICHOLAS SYMONS.*

THIS insolvent appeared for his interim order. From the examination of the learned Commissioner, it transpired that the insolvent signed his petition on the 1st of December, but did not file it till the 14th of December. Before he signed his petition, namely, on the 28th of November, he was summoned by a creditor to the County Court, and, on the 9th of December, an order was made against the insolvent by the learned judge for the payment of the debt.

MR. COMMISSIONER PHILLIPS said, that he never met a case of more glaring oppression on the creditor. He often met with cases in which insolvents signed their petitions after judgment was obtained in the County Court; but here the debtor had anticipated the proceedings there, by obtaining a petition and keeping it cut and dry in his pocket to be ready for use immediately. He was summoned by his creditor on the 28th of November; and on the 9th of December judgment was obtained. He had framed a petition on the 1st of December, and instead of filing it then, and giving his creditor notice, he had allowed him to incur all the trouble and expense of obtaining a judgment, and then a few days afterwards filed his petition. The insolvent, instead of paying his debt, stated that he had paid 10*l.* for the expense of petitioning that Court. The Commissioners had resolved that when it was clearly apparent that the purpose of a petitioner was to avoid a County Court judgment, they would withhold protection for such time as the circumstances of the case rendered it desirable. They could not suffer this Act to be abused in this manner, for if they did, there was not a creditor in the kingdom

who would be benefited by the County Courts. In this case no day would be named for the final order, but, after a certain time, the insolvent might come up again under the 28th section.

Re NICHOLAS SYMONS.

Adjourned without protection for having put the creditor to unnecessary expense.

MR. COMMISSIONER PHILLIPS remarked, that the meaning of the protection statutes was much misunderstood. They were intended for the benefit of unfortunate persons who, when they found themselves embarrassed, should petition that Court and give up their property; but if instead of doing so, they lie by, and put their creditors to the expense of suit, they must come up under other Acts of Parliament.

INSOLVENT DEBTORS' COURT.

January 6, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Protection Case.

Re WILLIAM DAIN.

County Court Orders.

There is no invariable rule as to the mode of dealing with insolvents against whom judgments have been obtained in the County Courts. The Court will exercise its discretion in every such case, upon a view of all the circumstances.

THIS insolvent appeared for his interim order.

Cooke, for the opposing creditor, said that he was instructed to take an objection *in limine*, to the *locus standi*. An order was made in the County Court in May last, that he should pay the debt of the opposing creditor by instalments, which he had not done. He saw from a report in the *Times* Newspaper, which he had before him, that Mr. Commissioner Phillips, on the previous day, had intimated that the commissioners had met and come to a determination that, in all cases of this description, the Court would decline to interpose by allowing petitioners to enjoy the benefit of the protection statutes. This was a matter of considerable interest to the profession, and they were desirous to test this report by bringing it immediately under his notice.

Re WILLIAM DAIN.

The CHIEF COMMISSIONER was not aware that any determination founded upon so broad a proposition as that stated by the learned counsel had been come to by the commissioners. He did

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not know what might be stated in the newspaper, but certainly he had no knowledge of any such rule as that alluded to having been laid down by the Court. Every case of this kind must depend upon its own peculiar features. The case must proceed.

Daniel Joseph Potts, the opposing creditor, was then called. He said that the insolvent was a painter. He let him have goods in the way of his trade. Payment was to be made three months after the debt was contracted in March, 1847. He did not pay. He summoned insolvent to the County Court, and obtained a judgment for 11*l.* He summoned him for 18*l.*, but the amount was reduced by a set-off. His debt originally was 29*l.* 18*s.* 3*d.* He had a judgment summons there. The amount was not mentioned. It was to be paid by instalments of 1*l.* a month. The order to pay that sum is given to the defendant. The insolvent paid two instalments, but no more. He then obtained a judgment summons. There was no date upon it. He attended on the 21st of October.

The CHIEF COMMISSIONER.—Where is the second order for payment?

Insolvent.—I never received a second order.

Cooke.—I believe there is no second order issued.

The opposing creditor said he did not proceed to put him in prison. The insolvent came there to get rid of the order.

The *Insolvent* stated that the amount of his debts was 120*l.* He was in business as a painter. He was a master and a journeyman at times when he could not get business on his own account. Besides his opposing creditor, Mr. Allen had sued him in the Palace Court for 17*l.* He did not know whether a judgment had been obtained. His landlord had taken proceedings against him. He settled that claim in October. He made on an average by his business 35*s.* a week. He could not pay the opposing creditor from illness. When he found himself in difficulties, he got a friend to go round to his creditors and offer them 5*s.* in the pound, and to say that if able, he would pay the residue, or work it out in the best manner he could. The person he sent round to his creditors was named Jenkins.

Cooke.—Where was the 5*s.* in the pound to come from?

Insolvent said, that a portion of the money he intended for that purpose he paid to his attorney. He had not that sum by him, but he would have got it in the best manner he could. He asked for a month to pay it. He did not give up any thing to his creditors.

Cooke.—Then you prefer coming here and giving the money you intended for the creditors to your attorney?

The *Insolvent* said that he had losses in trade. One of his creditors, who owed him 24*l.* for work done, named Grey, passed through that Court on the preceding Saturday. That creditor gave him a bill to the amount of his debt, which he gave to his landlord. The bill was not paid. His landlord had put a distress into his house that morning. The distress was for three quarters' rent. His rent was 30*l.* per annum. He made no other offer to his creditors.

By the CHIEF COMMISSIONER.—A child of his died that *Re WILLIAM DAIN.* morning. He had a family of five children living now between the age of two years and sixteen years. The child sixteen years of age was a girl. She had a bad arm, and could do nothing. He got the 9*l.* 16*s.* which he paid to his attorney, Buchanan, from different parties for work done.

The CHIEF COMMISSIONER, addressing the attorney, observed that the insolvent stated that he collected the 9*l.* 16*s.* from debtors owing him money. He was not debited in his special balance sheet with the receipt of that sum.

Buchanan said, that if the special balance sheet was in the nature of an account current for six months, then it should have been done. He believed he had adopted the ordinary course.

The CHIEF COMMISSIONER.—The special balance sheet must show what moneys the insolvent has received, and for what, and from whom, and how disposed of. If the insolvent had received money, and did not debit himself with it, there was confusion.

Cooke said that the money he received he ought to have stated clearly and distinctly, and not only what goods he had had, but the money he received for them. The money was an important matter, for he might have received money for goods bought six months ago, but the money he might keep in his pocket.

The CHIEF COMMISSIONER said, that the evidence now showed that without a careful consideration of the peculiar circumstances of each case individually, justice could not be done. An insolvent's position in life, his conduct, and every feature of his case should be fully known. Every case must depend upon its own circumstances.

Cooke conceived that that was the sound principle of action. He could not see that there was any more reason for refusing a man protection against County Court judgments and orders, than for refusing him protection against the judgments of the superior Courts.

The CHIEF COMMISSIONER said that if justice must be done according to the peculiar circumstances of the case, no general rule could be laid down, but if he found that an insolvent wished to avail himself of the indulgence of the protection statutes for the purpose of not paying anything when he could pay something, he should not have the benefit of these Acts of Parliament.

The case was adjourned for amendments.

January 27, 1848.—The COURT granted the final order.

INSOLVENT DEBTORS' COURT.

November 4, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection Case.**Re GEORGE BOHN.**Former Insolvency.*

The petition of a trader debtor cannot be sustained, if his unpaid debts under a former insolvency are not inserted in his present schedule.

Re GEORGE BOHN.

THIS insolvent appeared for his interim order of protection. The CHIEF COMMISSIONER observed that the insolvent petitioned that Court, under the 7 & 8 Vict. c. 96, "as a trader, but owing debts amounting in the whole to less than 300*l.*" The debts in the schedule amounted to 292*l. 9s. 1d.* but he had passed through that Court many years before, having debts upon that occasion, as appeared by the schedule in Court, amounting to 286*l.* and these debts were not inserted in his present schedule. He inquired of the Bar whether there was any united action amongst the commissioners in the Court of Bankruptcy, upon such a case as that of a man who petitioned under the 7 & 8 Vict. c. 96, as a trader debtor, but who had been discharged by that Court under the 1 & 2 Vict. c. 110, and whose debts were still unpaid?

Nichols (amicus curiae) said that the debts in the schedule in that (Insolvent Debtors) Court must be transferred into the schedule, under the 7 & 8 Vict. c. 96, and if the debts together exceeded 300*l.* he could not petition. He believed that that was the uniform practice of all the commissioners.

The CHIEF COMMISSIONER said that the point was not taken by this gentleman (the insolvent was opposed by a creditor in person), but he observed that the fact was so.

Nichols said that he believed the practice of the commissioners in the Court of Bankruptcy in reference to this point was guided by sound principles. It was well established that the debts were not extinguished.

Dowse (amicus curiae) confirmed the opinion of *Nichols* respecting the unity of practice upon this point amongst the commissioners in bankruptcy, although the entry of the old debts was often permitted in a very irregular manner. The provisional assignee was often inserted for the whole amount, which was a very objectionable mode. Every creditor should be inserted for the sum due to him.

Massey (the chief clerk) pointed out to the Court that the debts were twenty years old. *Re George Bohn.*

Nichols observed that the statute kept these debts alive.

The CHIEF COMMISSIONER said that as it was a point of importance, and likely to arise frequently, he would adjourn the case for a fortnight, and in the mean time communicate with his brother commissioners.

The case was adjourned to the 22nd of November: on that day,

The CHIEF COMMISSIONER said that this case had stood over to allow the commissioners time for considering whether debts under previous insolvencies were to be inserted in the schedule. They had a good deal of discussion on the subject, but had not yet come to a decision. All that he could then say was, that it was very likely that the decision of the Court would be in favour of the insertion of the debts under previous insolvencies; and if so, this petition would be dismissed.

The case was further adjourned till the 17th of December, upon which day the Court, before pronouncing judgment, heard the argument in another case, which stood over for consideration on the same point.—*Re David Brakenridge*, which occurred before Commissioner Harris, in which counsel appeared.

December 17, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS and MR. COMMISSIONER HARRIS.)

Re DAVID BRAKENRIDGE.

NICHOLS appeared for the insolvent.

Lucas, for the opposing creditor, objected to the jurisdiction of the Court, inasmuch as the debts owing by the insolvent exceeded 300*l.* and he was a trader. The debts in his present schedule amounted to 270*l.* odd. The debts remaining due from his former insolvency amounted to 140*l.* One very material point which might distinguish this case from others was, that he was insolvent in 1845, after the passing of the 7 & 8 Vict. c. 96, and that raised this distinction between the two cases. *George Bohn* was formerly discharged under the 1 & 2 Vict. c. 110; but in this case the former discharge of the insolvent took place under the 7 & 8 Vict. c. 96, and inasmuch as, by the case of *Toomer v. Gingell*, decided in the Court of Common Pleas, the person only of an insolvent was protected, and his property remained at all times subject to his creditors by an action at law, he submitted that the debts were not extinguished, and that they ought to be inserted in the schedule; and, if so, the insolvent was without the jurisdiction of the Court.

Re DAVID BRAKENRIDGE.

Nichols submitted that the debts in the bankruptcy schedule were debts which ought not to be inserted in the schedule filed in this Court. The insolvent obtained his final order in the Court of Bankruptcy; and upon that petition his debts amounted to 140*l.* These were

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not such debts as were intended by the words in the first section of the 5 & 6 Vict. c. 116. In the first place, they were debts very distinguishable from ordinary debts,—they could not be enforced by ordinary process. In regard to the debts inserted in the schedule in the Court of Bankruptcy, the person was protected. It was true that by the case of *Toomer v. Gingell* the final order did not protect the property, but the soundness of that decision was questionable. There could be no reason in the world why debts should be twice put in. The object of these statutes was simply the protection of the person. Assuming that to be so, what need was there of putting debts due under a former insolvency in subsequent schedules? The insolvent had his protection against them. He was aware that it depended upon the construction to be put upon the words "but owing debts amounting in the whole to less than 300*l.*"

The CHIEF COMMISSIONER said that this was a question whether David Brakenridge, who described himself as a trader, but owing debts amounting in the whole to less than 300*l.*, should have the benefit of this Act under the circumstances stated. His present debts amounted to 271*l.* and he states that he petitioned the Court of Bankruptcy as an insolvent debtor in 1845, and obtained a final order, his debts then amounting to 140*l.* These debts, added to those in his present schedule, bring the amount above 300*l.* The question is, whether, under the 5 & 6 Vict. c. 16, s. 1, this person is entitled to the benefit of that very lenient statute with respect to debtors. That section enacted, that if a person, being a trader, but owing debts less than 300*l.* petitioned this Court, it should give relief; but if the debts exceeded 300*l.* this Court should not interfere. The question, therefore, was substantially whether or not this insolvent did owe debts amounting in the whole to above 300*l.* It was to be noted that the words "being a trader, but owing debts less than 300*l.*" were put expressly. There was no qualification, or limitation, or reference to other Acts of Parliament. The question has arisen in the kindred law of bankruptcy, and has been discussed very much, as to whether the debts of a discharged insolvent were extinguished. In the case of *Jellis v. Montford*, 4 Barn. & Ald. 256, it was a question whether or not these debts were extinguished; and it arose upon a question whether a creditor might, after an insolvent's discharge, take out a commission of bankruptcy against him. In that case the debt in the schedule was considered a sufficient petitioning creditor's debt at law. The point was ably argued, and the judges, no mean men, (Lord Chief Justice Abbott, Mr. Justice Bayley, Mr. Justice Best, and Mr. Justice Holroyd,) came to an unanimous decision that it was not extinguished, but would sustain a petitioning creditor's debt. Parts of the judgment of the Lord Chief Justice were so strong, that he would read them. "The single question in the case (*Jellis v. Montford*) is this, was the bankrupt, at the time when the commission issued, indebted to the petitioning creditor? Unques-

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tionably that debt at one period did exist, and the only point to be considered is, whether by the operation of the Insolvent Debtors Act it was subsequently extinguished: for if it was so extinguished, the commission cannot be supported; but if not, it still remains a debt; and we, sitting in a Court of Law, must pronounce the commission founded upon it to be valid. In the course of the argument many inconveniences have been pointed out to us with which the issuing of a commission of bankruptcy, in a case like the present, might be attended; but we ought not to forget that in all cases it is in the power of the Lord Chancellor, by superseding the commission, to remedy these inconveniences. And, on the other hand, it may be observed that there are also many cases where, *notwithstanding a party's discharge* under the Insolvent Debtors Act, it may be of the utmost importance for the benefit of his creditors, that a commission of bankruptcy should issue; for the assignee under it has a much more extensive power of recovering the effects of the bankrupt than is given by the Insolvent Debtors Act. All these respective inconveniences and advantages may be presented to the consideration of the Lord Chancellor, but we, in a Court of Law, have only the power to determine whether the petitioning creditor's debt be sufficient, and not to enter into the question whether a commission ought or ought not to issue. *The proper course for us to pursue is, therefore, to inquire only whether the Insolvent Debtors Act contains any provision which extinguishes the debt.* Now, if the Legislature had intended to extinguish it, *one word would have been sufficient*: but no such word is found in the Act of Parliament. On the contrary, for all purposes of obtaining relief and ultimate payment, in common with the rest of the creditors, the debt is still recognized as in existence. I am therefore of opinion that the debt was not extinguished, and that it was one upon which a commission of bankruptcy might properly be founded." So said he there, if it were extinguished, it might have been done in one of the recent Acts of Parliament, but there were no such words to be found in either of these Acts. Therefore, that settled that point. This man was not remediless. If his creditors thought fit to leave him alone, he would go on in the usual way; but if they put him in prison, he could file his petition forthwith, under the 1 & 2 Vict. c. 110. There were many who considered these statutes a large boon to debtors; and if it was intended that they should have the advantage of the extinguishment of their former debts by a discharge, it might have been done, as the Lord Chief Justice observed, by a dash of the pen. The question was, whether the debts were extinguished, and the cases cited decide that they are not. Therefore, this case did not fall within the provisions of the Act of Parliament. But it was not alone upon the authority of these cases that the judgment in this case would rest; it was the concurrent opinion of all the learned commissioners in bankruptcy that these debts were still existing debts. There never was one dissentient voice except the late

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Sir C. Williams; but he had reason to believe that he altered his opinion before his death, and sided with the rest of the commissioners. It would be very awkward to put themselves as antagonists to these learned gentlemen and their decision upon this point. With respect to his brother commissioners, Commissioner Phillips entirely agreed with the Commissioners in Bankruptcy upon this point. Commissioner Harris had some struggles in his mind, but although he could not go with him to the full assent, his doubts did not go so far as to induce him to differ in practice from the decision of the Court. Some difficulties had also been expressed by Commissioner Law, but they were not insuperable so as to lead him to a decision directly opposite. The whole Court therefore concurred in the propriety of requiring the debts entered in former schedules to be inserted anew upon a subsequent schedule, and seeing no material distinction in either of the cases standing over for judgment, they required it to be done in both cases now before the Court, and that would place the insolvents without the jurisdiction of these statutes. The petitions would therefore be dismissed.

MR. COMMISSIONER HARRIS said, that both these petitions were under the Protection Acts. If an insolvent came there and asked protection a second time, there was no hardship or difficulty in requiring him to insert the debts in his former schedule. The Court had now decided that this was to be done, and he begged that this decision might be considered as a precedent in all similar cases in future. He concurred in all points with the Chief Commissioner with respect to cases arising under these Acts of Parliament. The petitions in those cases, depending upon the decision of the Court as to this point, must therefore be dismissed.

THE CHIEF COMMISSIONER observed, that in what might be called legitimate insolvent cases the amount of debts was certainly a material in the case; but under the protection statutes the amount was of the very essence of the question as to whether or not a petitioner was entitled to any benefit under them.

Petitions dismissed.

The mode of entering the old debts in the schedule is a point of practice of considerable importance. From the case of *Re John Cogan*, 10 Law Times, 311, it would appear that the creditors in the former schedules were to be named individually in the new schedules under subsequent insolvencies, but upon the 28th of January, 1848, Mr. Commissioner Phillips, before whom that case occurred, intimated that he had been misunderstood, and laid down the practice, of which the following is the registrar's note, which is given for the information of attorneys in protection cases:—"If a petitioner has previously taken the benefit of the 1 & 2 Vict. c. 110, he must insert in his present schedule the provisional or other assignee (as the case may be) and serve him. If he has petitioned the Bankruptcy Court or this Court for protection previously, he must insert the official or trade assignee (as the case may be), and serve him. The names of all the creditors need not be individually

entered." Mr. Commissioner Harris and Commissioner Law, upon the same day, intimated their concurrence upon this point of practice, the latter learned Commissioner observed that his attention having been called to the report of the practice as alleged to have been laid down in *Cogan's case*, he had communicated with his learned brothers (Commissioners Harris and Phillips) who concurred in his opinion, that it was not necessary to insert by name creditors under former insolvencies. He observed that it might so happen that a man might have had an enormous schedule twenty years ago, and at the expiration of that period he might again be under the necessity of applying to the Court for relief from a very small amount of debt; under such circumstances, if he was required to insert all the creditors under his former insolvency, his schedule might cost him 80*l.* or 90*l.* instead of 8*l.* or 9*l.*, which in some cases might be an absolute bar to relief.

Note.—The case of Jellis, assignee of Routledge a bankrupt, against Montford, is as follows:—"A creditor of an insolvent trader may, after the debtor's discharge under the 53 Geo. 3, c. 102, take out a commission of bankruptcy against him, and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt at law to support the commission."

West, for the plaintiff, said, that the only question in this case was, whether there was a good petitioning creditor's debt to support the present commission, and this will depend on the circumstance whether the debt of the plaintiff was discharged by the proceedings under the Insolvent Debtors' Act. But the discharge spoken of throughout that Act is only a discharge of the insolvent from custody, but not a discharge of him from his debts. * * * It takes away the remedy by action, but leaves the debt unextinguished.

Loves, Serit. contra.—In order to constitute a good petitioning creditor's debt, it must be a legal debt, and one which the creditor has the power to enforce by legal remedy.

BAYLEY, J.—It seems to me that the petitioning creditor's debt was not so far discharged by the operation of the Insolvent Debtors' Act as to deprive him of the right of suing out a commission founded upon it.

HOLROYD, J.—Although the Insolvent Debtors' Act may be a bar to any action, yet the creditor is not thereby deprived of all legal remedy. I am therefore of opinion that this was still a subsisting debt, sufficient in a Court of Law to support the present commission.

BEST, J.—The question here is whether the debt was extinguished by the discharge under the Insolvent Act. I think it impossible that that should be the case, when by the Act it is to be kept alive for various purposes. The only object of the Act was to protect the insolvent debtor after his discharge from being arrested again for the debt. The case of *Quanstock v. England*, 5 Burr. 2, 628, seems to me an authority in point. In *Ex parte Dredney*, 15 Ves. 498, the objection that the debt was barred by the Statute of Limitations was taken by the assignees acting for the creditors at large, but there is no case which can be cited where such an objection can be taken by a stranger, which is the case here. I think therefore that we ought to give judgment for the plaintiff.—*Judgment for the plaintiff.*

The opinions entertained in the Court of Bankruptcy upon this important point, as to whether debts, by being inserted in an insolvent's schedule, extinguish the rights of the creditors for other purposes, will be seen from the next case, *Re Lyon*, a report of which could not be obtained either by the Court or the Bar when the cases of *Re George Bohn* and *Re David Brakenridge* were under consideration.

February 23, 1844.

(Before MR. COMMISSIONER HOLROYD.)

In re Lyon.

Where A. became insolvent in the year 1836, and inserted the debt of B. in his schedule: Held, that B. might prove for the debt under the subsequent bankruptcy of A. in 1842, and that his right to prove was not barred by the statute of limitations.

In this case, Norton, solicitor for his client, Robinson, sought to prove against the bankrupt's estate for 174*l.* 15*s.* on a warrant of attorney. He stated that the question which arose in this case had been brought before Mr. Commissioner Fonblanque on a former occasion and fully argued by counsel, and that on that occasion Mr. Commissioner Fonblanque, who was at the time sitting for the learned Commissioner now present, had decided to

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MONTFORD.

Re Lyon.

Re Lyon.

to admit the proof, but a document having been mislaid, a claim to prove only was put on the file. The circumstances under which he sought to prove were as follows:—

The warrant of attorney from Lyon to Robinson was given in the year 1834, and was for a debt contracted shortly before that time. No proceedings were taken to enter up judgment, and in the year 1836 Lyon became insolvent, and took the benefit of the Act, Robinson's debt being duly inserted in the insolvent's schedule. Subsequently to this Lyon again got into difficulties, and in 1842 became a bankrupt. The question now was, on these facts, whether or not Robinson could come in and prove his debt on the warrant of attorney under the bankruptcy.

Dangerfield (solicitor to the assignees), objected to the proof on two grounds; first, that Robinson had no right to prove under the bankruptcy at all, his debt having been inserted in the schedule under the insolvency in 1836; and secondly, that if he ever had that right, that in this case it was barred by the Statute of Limitations, more than six years having elapsed between the insolvency of Lyon and his subsequent bankruptcy.

Norton, contra.—The insolvent's schedule is in the nature of a trust for the benefit of creditors, and therefore the insertion of the debt in the schedule prevents its being barred by the Statute of Limitations. As to the other point, the case of *Jellis v. Montford* shows that a debt inserted in an insolvent's schedule will, after his discharge, be a sufficient petitioning creditor's debt to a fiat of bankruptcy subsequently taken out against him, and consequently we are entitled to prove, unless barred by the Statute of Limitations.

Authorities cited *Jellis v. Montford*, 4 B. & A. 256; *Barton v. Tatterall*, 1 Rus. & Myl. 257; *Ward v. Painter*, 2 Bevan; *Curtis v. Sheffield*, 8 Simon, 706; *Browning v. Paris*, 5 M. & W. 117; *Davis v. Shipley*, 1 B. & Ad. 54; *Ex parte Fenwick*, 4 Mon. & Ayr. 681; *Ex parte Barrington*, 1 Deacon, 7 Geo. 4, c. 57, ss. 57 & 60; 1 & 2 Vict. c. 110, ss. 87, 90, & 91.

Per Curiam.—As it is stated that this question was argued before my brother Commissioner, and is one of some importance, I shall not decide the point without consulting him, and looking into the authorities which have been brought under my notice.—*Cur. adv. vult.*

MR. COMMISSIONER HOLEYDOWD now proceeded to give judgment, and stated that, since the argument in this case yesterday, he had consulted Mr. Commissioner Fonblanche, who remembered the case being argued before him on a former occasion, and fully concurred in the judgment that he was now about to give. The learned Commissioner then recited the facts of the case, and stated that with regard to the first point he had no doubt that a creditor of an insolvent might prove under the subsequent bankruptcy of the debtor, for which the case of *Jellis v. Montford*, and *Ex parte Fenwick* and *Ex parte Barrington*, were distinct authorities, the principle being that the debt was not extinguished by the insolvency, but merely the remedy against the person of the debtor taken away. With regard to the point whether or no the Statute of Limitations had barred the right to prove, he was also clearly of opinion that it did not do so. The vesting of the insolvent's estate in his assignees was in the nature of a trust, and therefore the statute does not run. It therefore appeared upon all the cases that the debt is still a valid one, and that the creditor has a clear right to prove. The case of *Browning v. Paris* did not affect the question either way, that case being decided on other grounds, and arose under the 52 Geo. 3, c. 165, which Act did not contain any provision taking after-acquired assets out of the operation of the Statute of Limitations which the subsequent Insolvent Acts did. He should therefore, upon the authority of the various cases cited, admit the proof.—*Proof admitted accordingly.*

(The report of this decision appeared in the *Legal Chronicle* or *Digest* of proceedings in the superior Courts of Law of Saturday, March 2, 1844, but this publication being now out of print, the case is given entire.)

INSOLVENT DEBTORS' COURT.

December 18, 1847.

(Before MR. COMMISSIONER HARRIS.)

Protection Case.

Re JAMES MILLER.

Plaintiff's in Custody for Costs in an Action for Slander.

A plaintiff in an action for slander, in custody for the costs, applying for relief under the protection statutes, will have no day named for his final order.

THIS insolvent was in custody for the costs in an action on the case for slander brought by him against the opposing creditor, Mr. Johnstone, for whom *Nichols* appeared.

Re JAMES MILLER.

The record in the action was produced. A plea of justification had been put in, and there was a verdict for the defendant at the trial. Judgment was signed on the 6th of November, 1847. The costs were taxed at 65*l.* 15*s.*

Nichols submitted that upon this evidence the Court had no power to make a final order. That would be apparent by a reference to the 4th section of the 5 & 6 Vict. c. 116, re-enacted by the 24th section of the 7 & 8 Vict. c. 96, which recited that "if the debts of the petitioner, or any of them, were contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out of a fiat in bankruptcy, or malicious trespass, the commissioner shall not be authorized in any such case to name any day for making such final order, or to renew such interim order." He relied upon those words, if the debts of the petitioner or any of them were contracted "by reason of any judgment in any action for slander." The defendant had a judgment here to the amount of his costs. The section was an extension of the 1 & 2 Vict. c. 110, s. 78, "or shall be indebted for damages recovered in any action for a malicious prosecution, or for libel, or for slander," &c. In this case the debt could not be considered damages, but he submitted confidently that it was a debt contracted by reason of a judgment in an action for slander.

MR. COMMISSIONER HARRIS said, that the question was whether this Act of Parliament could be applied to a plaintiff in an action for slander. It was a very grave point, and its decision must govern

Re JAMES MILLER.

the practice of this Court in future. He must consult his brother commissioners, for which purpose the case must stand adjourned to the 15th of January. On that day,

Dowse, for the insolvent, said, that the Court in *Re Nash* had intimated an intention to assimilate as much as possible the practice under the Protection Statutes to that under the 1 & 2 Vict. c. 110. If the insolvent had petitioned under this last mentioned statute, it was perfectly clear that he would have been entitled to his discharge, because in the 78th section the word "damages" indicated the class of persons who were not entitled to an immediate discharge. The clauses in the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, were not so precise, but if they were read with attention no doubt could be entertained but that defendants alone were the persons who were not to have their final orders. The words were (sect. 24) "that such debts or any of them were contracted by reason of any judgment in any proceeding for breach of the revenue laws, or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious suing out of a fiat of bankruptcy, or malicious trespass." Now, who could contract a debt by reason of a breach of the revenue laws, but a defendant against whom the Crown brought a suit? So, who could contract a debt in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, &c., but defendants against whom actions were brought? If an action was brought by a plaintiff, and he lost, it never could have been contemplated that he should be amenable for having incurred costs. It was, however, different as respected defendants. He submitted that the intention of this Act of Parliament was similar to that clause (78) in the 1 & 2 Vict. c. 110, which rendered an insolvent liable to remand in certain cases for defending an action, but in no case for bringing one.

Nichols was not called upon to reply.

MR. COMMISSIONER HARRIS intimated that he had submitted the point for the consideration of the commissioners, and after consultation, they were all of opinion that this was not a case for the appointment of a day for the final order.

INSOLVENT DEBTORS' COURT.

January 5, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

*Protection Case.**Re EDWARD LAWES.*

*Amount paid to the Attorney for the Expense of the Proceedings—Petition
—Special Balance-sheet—Variance.*

*A sum less than that filled up in the blank left in the petition for the
insertion of the necessary expense of petitioning the Court having been
paid to the insolvent's attorney, can the petition be sustained?*

*Held, that if the mistake does not appear to have been wilful, or for the
purpose of deceiving the Court, the petition will not be dismissed.*

THIS insolvent appeared for his interim order.
Dowse opposed for a creditor named Hodges.

*Re EDWARD
LAWES.**Nichols* supported.

Dowse stated his ground of opposition, but intimated that before entering upon it, he had an objection to make to a statement in the petition which was untrue. He begged the attention of the Court to the following paragraph: "That your petitioner has not parted with, or charged, any of his property (except for the necessary support of himself and his family, and the necessary expenses (not exceeding 12*l.*) of this his petition, or in the ordinary course of trade) at any time within three months of the date of filing this his petition, or at any time with a view to this his petition." To test the truth of the allegation regarding the sum paid for the necessary expense of this petition he would briefly examine the insolvent upon that point.

The *Insolvent*, in the course of his examination by the learned counsel, said that he had paid his attorney for expenses in the matter of his petition about 10*l.* He had paid that sum by instalments. The last instalment he had paid two days ago. Before he filed his petition he paid him 3*l.* 10*s.* He could not tell how that appeared in his special balance sheet.

Dowse said, that there was no mention of that in the special balance sheet. He submitted that the variance between the petition, special balance sheet, and the insolvent's evidence, was fatal.

Nichols begged the attention of the Court to the exact words of the allegation in the petition, to which attention had been directed. The insolvent did not say that he had paid his attorney 12*l.*, but

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that he had paid a sum *not exceeding* 12*l.* Did the sum he now stated that he had paid exceed 12*l.*? He was sure the Court would not dismiss the petition on that ground. The statement was quite consistent with the facts in evidence.

MR. COMMISSIONER PHILLIPS observed that the question was, "Did the statement alluded to in the petition convey to the Court that the expense of the insolvent's petition was 12*l.* and if it did, was that a true statement, or was it meant to deceive the Court?" The insolvent could not swear to it to-day.

Nichols found that in the general balance sheet, the insolvent stated that he paid his attorney 10*l.*

MR. COMMISSIONER PHILLIPS observed that the statement in the petition was 2*l.* more, and still there was a variance.

Douse said that, attached to the petition and schedule was an affidavit, "That the several allegations in the said petition and the several matters contained in the schedule hereunto annexed are true." Was the allegation, that he had paid his attorney 12*l.* a true allegation? He would take issue on that point.

Nichols said, that the whole must be taken together. Take the allegation in the petition with the statement in the general balance sheet and no indictment for perjury could be maintained.

Douse.—Had the insolvent paid his attorney 10*l.* or 12*l.* as stated in his petition? Neither the one sum nor the other was entered in the special balance sheet.

MR. COMMISSIONER PHILLIPS.—At the time of filing his petition he had only paid his attorney 3*l.* 10*s.* according to his own statement.

Nichols observed, that these were inaccuracies.

MR. COMMISSIONER PHILLIPS.—They are very unfortunate inaccuracies, as they occurred in reference to a debt the payment of which was disputed.

Nichols.—The insolvent's statement could easily be checked by a reference to Mr. Le Briton's books.

MR. COMMISSIONER PHILLIPS observed, that if upon reference to the books, it should turn out that the attorney received 10*l.* instead of 12*l.*, he should be very willing to exercise his discretion, as in that event he could hardly believe that, for the sake of 2*l.* a man would attempt to deceive the Court; but if it should turn out to be 3*l.* 10*s.* it was another matter.

Adjourned to produce Mr. Le Briton's books.

January 10.

The case came again before the Court, pursuant to adjournment. It appeared by the entries in the attorney's books, that he had received from the insolvent in all a sum of 9*l.* 10*s.*

Douse again submitted that the special balance sheet did not show that payment, and that the statements in the petition and schedule were untrue.

Nichols contended that when the insolvent said in his petition he had expended a sum not exceeding 12*l.*, he meant to say that he had not paid him more than that sum. The statement was not equivalent to a distinct and positive allegation, that the precise sum of 12*l.* was paid in that way. It was not an assertion that 12*l.* had been expended that way, but that he had paid a sum *not exceeding* 12*l.*, and in reference to the entry of 10*l.* in the general balance sheet, he submitted that in common understanding the statement that 10*l.* had been paid was quite consistent with the payment of 9*l. 10s.* which had been proved.

Re EDWARD LAWES.

Douse reiterated that there was a total omission of that payment from the special balance sheet.

MR. COMMISSIONER PHILLIPS.—He could have amended that. The question upon the petition now was, did 9*l. 10s.* exceed 12*l.*? The statement in the petition amounted precisely to an allegation that it did not.

Nichols asked his learned friend whether he could produce a case in point?

Douse.—The object of that paragraph in the petition was, to give information of what was the sum actually expended by an insolvent in coming to that Court. Suppose the insolvent had stated that he had expended a sum not exceeding 50*l.*, and the payment of 9*l. 10s.* was proved, would that be sufficient?

MR. COMMISSIONER PHILLIPS should be inclined to say in such a case that it was done wilfully; but suppose that he had paid various small sums, and suppose he could not exactly say to what they amounted, or should make an error in the calculation. In this case there was only a difference of 2*l. 10s.*

Douse.—The attorney was the man who filled up this blank, not the insolvent. Their own evidence did not support the allegation in the petition.

Nichols said, that a case had occurred before Mr. Commissioner Law, in which it was stated in the petition, that the insolvent's estate was of the value of nothing, and although it was shown that he had some property, that learned Commissioner refused to dismiss the petition.

MR. COMMISSIONER PHILLIPS.—If that statement was a wilful falsehood, he should dismiss this petition, but he thought that there was an equity in these cases. The omission was so very trifling, that the insolvent might well be mistaken in it, and

The petition would not be dismissed.

Note.—In the case of *Re John Lloyd*, which came before Commissioner Law, December 1, 1847, the insolvent stated in his petition that he had paid his attorney a sum not exceeding 10*l.* In examination he admitted that he had only paid the attorney 5*l.*

Douse submitted that the statement in the petition was tantamount to an allegation that he had paid 10*l.*, and as it appeared by his own evidence to have been no more than 5*l.*, it was untrue, and therefore the jurisdiction which the Court had over the petition was destroyed. Commissioner Law observed, that he did not say that he had paid 10*l.* to the attorney, he only said a sum not exceeding 10*l.* The insolvent now stated that he paid less than 10*l.*, having paid 5*l.* He did not think the two allegations inconsistent, and he therefore did not consider that a sufficient reason for dismissing the petition.

INSOLVENT DEBTORS' COURT.

January 27, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

ALARD *v.* BOSS.*Liability under the Small Debts Act in respect of debts omitted from the schedule.**An insolvent is liable for a debt, or any portion of a debt, omitted from his schedule, and a discharge or a final order will be no bar to proceedings against him in respect thereof, under the 8 & 9 Vict. c. 127.*ALARD
v.
BOSS.**T**HIS insolvent was summoned under the Small Debts Act, for the payment of the difference between the sum of 4*l.* 10*s.* and 7*l.* 8*s.* the debt due to the plaintiff, who was inserted in the schedule as a creditor for the former amount. The question was, had the Court jurisdiction in respect of that portion of the debt which had been omitted from the schedule?

MR. COMMISSIONER PHILLIPS said, that if the amount of the debt had been truly entered in the schedule, the plaintiff would have been entitled to notice, and at the insolvent's hearing he might have made such opposition against him as he might have been advised. He would now see what could be done under these circumstances. Was there any section withdrawing the protection in respect of the excess of the debt not inserted in the schedule?

Dowse (amicus curiae) said, that there was no power to withdraw the protection. Under the 12th section of the 5 & 6 Vict. c. 116, the final order might be rescinded; but for that purpose there must be a formal application by an assignee or a creditor. The 93rd section of the 1 & 2 Vict. c. 110, provided for the protection of insolvents in respect of the entry of any debt in the schedule, "at an amount which is not exactly the actual amount thereof without culpable negligence or fraud, or evil intention on the part of the insolvent." But this section was held by the Court of Exchequer to be no protection in a case precisely parallel to that now before the Court. The case he referred to was *Hoyles v. Blore*, 14 M. & W. 387; and 15 Law Journal, N. S. Exchequer, 28, in which a defendant, an insolvent, inserted the plaintiff as a creditor in his schedule; but by mistake, and without fraud, stated the debt to be 3*l.* whereas in fact it was 7*l.* The Court held that, as the creditor was thereby deprived of the benefit of the notice to be given to the creditors above 5*l.* under the 71st section this was not a case within the protection of the 93rd section, and the defendants

discharge under the Act was no bar to an action for this debt." In that case it would be seen that the Court held that the 93rd section was not applicable. So here, the defendant could not plead his discharge, therefore he was still liable. The 75th section of the 1 & 2 Vict. c. 110, protected the person of a discharged insolvent only as to the particular debts or sums of money inserted in the schedule. The words of the section were "such prisoner shall be entitled to the benefit of this Act as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner, before the time of making such vesting order as aforesaid, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees, or holders of any negotiable security *set forth in such schedule.*" Upon referring to the 22nd section of the 7 & 8 Vict. c. 96, it would be found that the words introduced were similar to those in the first-mentioned statute, and a decision upon the words of the one Act would be equally applicable to those in the other Act.

The case in point occurred at the Bristol Assizes, at which an action having been brought against an insolvent upon two promissory notes, the defendant pleaded his discharge under this Act, and averred that the plaintiff was one of the creditors named in his schedule filed in the Insolvent Court. It appeared that the plaintiff was mentioned in the schedule as a creditor for two sums of money not corresponding in amount with the sums mentioned in the notes, but the schedule made no mention of the notes. Thereupon Mr. Justice Erle directed a verdict for the plaintiff, and the Court of Exchequer held that the jury had been rightly directed, *Parke, B.*, observing that the question turned upon the 75th section of the statute, the meaning of which, according to its ordinary grammatical interpretation, *certainly was* that the insolvent was discharged as to these debts or sums of money *only*, which were specified in the schedule. *Leonard v. Baker*, 15 L. J.; N. S. Exchequer, 177; and 10 Jurist, 226; confirming *Tyers v. Street*, 7 Scott, 349, and overruling *Davis v. Lloyd*, 2 Jurist, 361. The inaccuracy of the statement in the schedule prevented the insolvent from enjoying the benefit of the Act of Parliament, in respect of the plaintiff's debt in that case, and the effect consequent upon the irregularity of the entry in this case would be the same. The adjudication under the one statute, nor the final order under the other, was any bar to an action under such circumstances. The Court, therefore, had full jurisdiction to deal with the defendant.

MR. COMMISSIONER PHILLIPS doubted the defendant's honesty, and upon the application of the plaintiff adjourned the examination for a fortnight, to allow time for the production of evidence as to the defendant's means of paying the debt.

ALARD
v.
Boss.

INSOLVENT DEBTORS' COURT.

January 15, 1847.

(Before MR. COMMISSIONER PHILLIPS.)

*Re RICHARD MARTIN.**Notice of Opposition.**An accidental mistake in entering notice of opposition in the office book, as to the day upon which it is intended to be made, is fatal.**Re RICHARD MARTIN.***T**HIS insolvent appeared for hearing, and was opposed by a creditor.

Nichols, for the insolvent, submitted that notice of his intention to oppose upon that day should have been entered in the book kept in the office for that purpose. That was the practice of the Court, and as this creditor had not conformed to it, his opposition should be disallowed.

The opposing creditor explained, that as he resided at Bath, he had deputed a friend in town to enter the usual notice of opposition in the office book, but he had apparently mistaken the date and entered it for that day week. He had travelled upwards of a hundred miles from Bath that morning for the express purpose of opposing the insolvent, and trusted that under these circumstances the accidental deviation from strict practice would be excused.

MR. COMMISSIONER PHILLIPS thought it a hard case, and would grant as an indulgence that it should stand over for a short time for the decision of the head of the Court (The Chief Commissioner).

Shortly after the Chief Commissioner took his seat upon the bench, when Commissioner Phillips explained to him the nature of the indulgence claimed by the opposing creditor, upon which

The CHIEF COMMISSIONER said that cases of this kind had occurred very often, twenty or thirty times to his recollection. The rules of the Court must be supported, or else everything would be afloat. The difficulty had arisen from the carelessness of the person to whom he confided his interest.

MR. COMMISSIONER PHILLIPS concurred.

Opposition disallowed.

INSOLVENT DEBTORS' COURT.

May 19, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS, and MR. COMMISSIONER PHILLIPS.)

Re WILLIAM ARGENT.

Oppositions, when admissible.

Creditors who have given due notice of their intention to oppose are not precluded from stating the grounds of their complaint before the adjudication is pronounced.

COUNSEL and the creditors who opposed in this case left the *Re* WILLIAM ARGENT. Court, expecting from the long list of cases in the paper, that it would not be called on till the afternoon. The case was nearly concluded, when

Sargood, who appeared for the opposing creditors, returned from the Court of Bankruptcy, where he had been making an application, and, apologising for his absence, begged to open an opposition.

Nichols, for the insolvent, objected that the case was nearly over, and the opposing creditors themselves were not present.

After some discussion upon the point of the admissibility of the opposition under such circumstances,

The CHIEF COMMISSIONER said, that until the adjudication was pronounced, the case was not concluded. If an opposing creditor came forward before that, strictly speaking, the Court was indulgent and never excluded. At the same time, some rule should be observed.

MR. COMMISSIONER PHILLIPS inquired the nature of the opposition.

Sargood said that it was for contracting debts, without reasonable expectation of payment, and by fraudulent representations.

MR. COMMISSIONER PHILLIPS said, that the latter part of the opposition could not be proved in the absence of the witnesses.

Sargood prayed to examine the insolvent.

The COURT said, that if he would not speak against time, he might do so.

Opposition admitted.

INSOLVENT DEBTORS' COURT.

January 17, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection Case.**Re WILLIAM COOTS.**Trader.**A lodging-house keeper and chimney-sweep is not a trader eo nomine within the meaning of the laws relating to bankrupts.**Re WILLIAM COOTS.*

MACRAE opposed the application of this insolvent, a prisoner for debt, to come up for his discharge under the 6th section of 7 & 8 Vict. c. 96.

The insolvent had described himself in his petition as a chimney-sweeper and lodging-house keeper, being a trader within the meaning of the laws now in force relating to bankrupts. He submitted that neither under the one description nor the other was he a trader. It was quite plain that a lodging-house keeper was not a trader. The case of *Gibson, assignee of Birch, v. King*, 10 M. & W. 667, was decisive upon that point. A chimney-sweeper was not a trader within the meaning of the laws relating to bankrupts. He did not work up commodities. The petition was therefore untrue, and could not be sustained.

The insolvent was examined by the Chief Commissioner. He said he had four houses. He let out one room furnished, and all the others unfurnished. For the furnished room he was paid 5s. a week. The unfurnished rooms were let at different prices. He bought in soot and sold it out. He had done that for a twelve-month past, but not frequently. Sometimes he gained by it, and sometimes he lost. He sold it to different carriers, who sold it in the country for farming purposes. He had done that twenty or thirty times.

Macrae said, that this dealing in soot was either ancillary to his business in the same manner as the partial dealings of a school-master with his scholars, or of a music-master with his pupils; or it was a separate branch of the trade, and if so he should have described himself as a dealer in soot. In either case the petition could not be sustained.

The CHIEF COMMISSIONER observed, that in certain cases of *Re WILLIAM COOTS.* doubtful trading an Act of Parliament had been passed to clear it up. This did not come under any of the classes specifically named.

Macrae said, that facts in bankruptcy might be supported by any species of trading under the words "dealer and Chapman;" but there were no such general words in this form of petition, in which it was imperative to fill in the "trade or trades, business or businesses, carried on by the petitioner during his six months' residence within the district of the Court."

The CHIEF COMMISSIONER, having consulted Mr. Commissioner Harris and Mr. Commissioner Phillips, intimated that the objection was fatal, and *The petition was dismissed.*

INSOLVENT DEBTORS' COURT.

December 10, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Protection Case.

Re JAMES GLOVER.

Held, that an omission to fill up the blank left in the petition for stating the day on which it was signed by the petitioner is fatal.

IN this case the day of the month upon which the insolvent signed the petition was not stated in the blank left for that purpose.

Re JAMES GLOVER.

The CHIEF COMMISSIONER directed attention to the fact, and observed that the form of the petition was given by the Act of Parliament, and it could not be touched. The petition must be full and true in the form specified, or it must be dismissed.

Duncan, for the insolvent, said that the question was, whether the petition was not full enough, when the month in which it was presented was stated. No deception was intended to be practised upon the Court. It was a mere *lapsus* of the petitioner, and he submitted that, under these circumstances, there was sufficient fulness and certainty.

The CHIEF COMMISSIONER referred to Paterson's Insolvent Practice, p. 10, and read, "The Court has no power to permit an amendment of any error or omission in the petition; and for any variation from the form prescribed by the Act the petition must be dismissed (7 & 8 Vict. c. 96, s. 2; *Re Adams*, 4 L. T. 378); and in *Re Monewick*, it was held that the omission of the date when the petition was presented was fatal. He thought that there was no power to amend the petition. If there was any blank of importance, it was the blank left for stating the time of signing the petition.

Petition dismissed.

INSOLVENT DEBTORS' COURT.

January 5, 1848.

(Before MR. COMMISSIONER LAW.)

*Protection Case.**Re WILLIAM SNOOK.**Petition.*

The petition of an insolvent within the jurisdiction of the Court will not be sustained if he has not been a resident for six months next immediately preceding the date of his application.

Re WILLIAM SNOOK.

THIS insolvent came up for his interim order, but in the course of the examination it transpired that he lived in Hampshire, that he had a house there, and that his family resided there. The insolvent said, "I still had a residence in London, and had to pay the rent."

MR. COMMISSIONER LAW said, the question was, has the insolvent resided six months from the 7th of June to the 7th of December within the jurisdiction of this Court? The 6th section of the 10 & 11 Vict. renders it imperative that an insolvent shall have resided six months next immediately preceding within the jurisdiction of this Court. The question was, could this insolvent be said to have resided for six months in London? It appears that he belonged to Portsmouth, and that he made an assignment in May, which made it convenient for him to come occasionally to London. He had lodgings in Lambeth, which he occupied upon these occasions. Could that be said to be a residence for six months next immediately preceding the date of his petition? He had no choice. There was a jurisdiction prescribed by the Act. The test was a six months' residence previous to the date of the petition. If the petitioner had not resided six months within his jurisdiction he could not touch the case.

Petition dismissed.

INSOLVENT DEBTORS' COURT.

January 6, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection Case.**Re ROBERT MARSH.**Petition.**If the petition is not signed by an attorney it will be dismissed.**If the places in which an insolvent has resided for six months previous to filing his petition are not filled up in the blank left for that purpose, the petition will be dismissed.*

THIS insolvent appeared for his interim order.

Re ROBERT MARSH.

Lucas, who opposed for a creditor named John Hone, directed the attention of the Court to the fact that the petition was not attested by any attorney, nor was the blank filled up in which it was requisite to insert the residences of the insolvent during the six months prior to the time of filing his petition. The fourth rule made under statute 5 & 6 Vict. c. 116, required that each sheet of the petition and schedule shall be signed by the petitioner in the presence of, and attested by, his attorney. He submitted that the petition should be dismissed.

The insolvent said that he had no money to pay a solicitor, and he had therefore to make out the schedule himself. He had procured a friend, who was a solicitor, to sign the sheets of the schedule; but he was ill, and he had not been able to obtain his signature to the petition.

The CHIEF COMMISSIONER read the paragraph in the petition, "That your petitioner has resided six calendar months within the district of this honourable Court: that is to say," and instead of the places of residence following, there was *blank*. Another paragraph was this:—"That your petitioner submits to this honourable Court the proposal for the payment of his debts contained in the said schedule," and there was no proposal. The last paragraph contained the words "signed by the said petitioner in the presence of" *blank* "attorney or agent in the matter of the said petition." It is quite clear that this petition could not be sustained.

Petition dismissed.

INSOLVENT DEBTORS' COURT.

December 9, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection Case.**Re JAMES DANIEL O'CONNELL.**Breach of Trust—Condonation.*

Under the 1 & 2 Vict. c. 110, the practice is, that any agreement or settlement between the parties subsequent to the contracting of a debt, which has the effect of altering its nature or character, will bar complaint.

Held, that this rule is extended to oppositions for improperly contracting a debt under the protection statutes.

Re JAMES D.O'CONNELL. **T**HIS insolvent was a clerk in the office of Messrs. Gregory, solicitors, Bedford-row, and while in their service proved a defaulter in respect of moneys intrusted to him for various purposes. The defalcations being discovered, his employers consented to waive proceedings, upon his giving them a warrant of attorney and effecting a policy upon his life, and covenanting to pay the premiums as they became due.

Gregory opposed upon the ground that the debt had been contracted by means of a breach of trust or fraud.

The CHIEF COMMISSIONER held that, as he had entered into a negotiation with the insolvent, and taken a security as a settlement, he could not go back to the original ground of complaint. He did not think that he could oppose on the ground of fraud.

Opposition disallowed.

INSOLVENT DEBTORS' COURT.

January 11, 1848.

(Before MR. COMMISSIONER HARRIS.)

*Small Debts Act.*BEYNON AND OTHERS *v.* BOWERS.*Commitment.*

The defendant not appearing, the Court will not make any order for his commitment until he has first been served with a summons to show cause why he should not be committed.

MACRAE appeared for the plaintiff. The Court having waited half an hour, and the defendant not appearing,

Macrae directed his Honour's attention to sect. 1 of statute 8 & 9 Vict. c. 127, and prayed a warrant for the commitment of the defendant.

MR. COMMISSIONER HARRIS laid down the rule that no order for commitment should be made against a defendant for non-appearance, without a summons being first served upon him to show cause against it. That would be the practice in future.

A summons to that effect was directed to be made out.

BEYNON AND
OTHERS
v.
BOWERS.

INSOLVENT DEBTORS' COURT.

December 10, 1847.

(Before MR. COMMISSIONER PHILLIPS.)

*Re ZACHARIAH SMITH.**Action for Debts in Schedule—Detainer.*

If an insolvent neglects to plead his discharge in bar to an action brought against him in respect to a debt inserted in his schedule, it is his own default, and if he is arrested this Court will not interfere to liberate him from prison.

If an insolvent be detained by a creditor at whose suit he has been remanded, after the period of remand has expired, this Court will not order his discharge.

THIS insolvent was a prisoner confined for debt in the Queen's Prison. He petitioned the Court on the 24th of May, 1847, being at that time in custody for debt at the suit of John Lamb, for a sum of 28*l.* 15*s.* 8*d.* The vesting order was made on the 31st of May, and on the 5th of June the schedule was filed. Upon the 6th of July the insolvent was heard, but being opposed on behalf of Maria Caines he was remanded under the discretionary clause

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Rs
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for six months from the date of the vesting order at her suit. This creditor, however, had not lodged a detainer against him at the prison, and the insolvent went out of custody. At the insolvent's hearing an action was pending against him, brought by Messrs. Fennell, Child and Kelly, whose names were inserted in the schedule as creditors. He had obtained time to plead, but after the adjudication he did not plead, and judgment was given against him by default. He was taken upon a *ca. sa.* and Maria Caines, at whose suit he had been remanded, hearing that he was in custody, also lodged a detainer against him at the prison.

Nichols applied for an order to discharge the insolvent, upon the ground that the names of the detaining creditors were inserted in the schedule as creditors, and the debts for which he was arrested were the same. He had been discharged from all his debts by an adjudication of that Court on the 6th of July last, except that of Maria Caines, at whose suit he was remanded for six months, but that period had now elapsed, and he was therefore clearly entitled to his liberty.

MR. COMMISSIONER PHILLIPS doubted whether this Court could interfere. As it was, however, a matter quite new, he would consult the Chief Commissioner.

Nichols said, he thought that if the learned Commissioner would refer to the 85th section, he would find that he had authority. The insolvent did not go out of custody on account of any arrangements with any creditor, but because the adjudication was at the instance of Maria Caines only. This section was precisely applicable to the case: "Provided always, and be it enacted, that in all cases where it shall have been adjudged that any such prisoner shall be so discharged, and so entitled as aforesaid, at some future period, such prisoner shall be subject and liable to be detained in prison and to be arrested and charged in custody, at the suit of any one or more of his or her creditors, with respect to whom it shall have been so adjudged at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this Act had not passed: provided nevertheless, that when such period shall have arrived, such prisoner shall be entitled to the benefit and protection of this Act, notwithstanding that he may have been out of actual custody during all or any part of the time subsequent to such adjudication, by reason of such prisoner not having been arrested or detained during such time, or any part thereof." He was aware that the Court could not interfere if the period of remand had not expired; but that time was now past, and this section contemplated these very cases "when such period shall have arrived, notwithstanding that he may have been out of actual custody during the whole or any part of the time allotted for the demand, he shall be entitled to the benefit and protection of the Act." But if the Court was still doubtful about the matter, there could be no danger in granting a rule *nisi*, which was all he asked, and in the meantime he would look into the cases.

The COURT granted a rule *nisi*.

December 21.

Hawkins showed cause.—He did not admit that the debt on which the insolvent was now detained was the same as that from which he had been discharged by the Court. After the vesting order had been made Messrs. Fennell and Co. brought an action against the insolvent, who ought then to have pleaded his discharge in bar, as an application was made to a Judge on behalf of the defendant for an extension of time to plead, which was granted; and that extension did not expire until two days after the adjudication had been pronounced by this Court. The insolvent not having pleaded his discharge, must now take the consequences. When taken on August 17, upon a *capias*, the insolvent applied to Mr. Baron Platt to be discharged; but that learned Judge dismissed the summons, observing that "as he had not thought fit to plead his discharge, the creditors had been justified in taking out execution, which was quite regular, and could not be interfered with." He cited *Denne v. Knotte*, 7 M. & W. 143, and strongly relied upon the observations of Mr. Baron Parke, in giving judgment. The learned Baron said that, "if a party who has been discharged by the Insolvent Debtors' Court be subsequently arrested on *mesne* process for a debt in respect of which he was discharged, the law enables him to apply for his discharge; but if an action be brought against him, and, instead of pleading his discharge, he allows the plaintiff to get final judgment, it is his own default, and the law must take its course."

Nichols replied, that if the insolvent had pleaded his discharge, it would have been no bar to the action, as the 85th section of the 1 & 2 Vict. c. 110, gave power to any creditor to take an insolvent in execution during the currency of a remand. He also contended that this debt of Messrs. Fennell, having been entered in the schedule, was not changed into a new debt by the mere fact of their having obtained a judgment.

MR. COMMISSIONER PHILLIPS, after conferring with the Chief Commissioner, said, in this case it was clear there was no new debt, except the costs, which created a distinction between it and that of *Denne v. Knotte*; but that distinction was obviated by the remarks of Mr. Baron Parke, quoted in the report of the case referred to. He could not imagine anything more clear than that these remarks were perfectly applicable to this case. He could not see much force in the objection of Mr. Nichols, that, under the 85th section the plea of a discharge would not operate in bar during the time over which the remand pronounced by the Court would extend. The Chief Commissioner agreed with himself in a clear opinion that the insolvent ought to have pleaded his discharge; but, not having done so, the judgment obtained by the creditor was perfectly regular, and, consequently, the Court could not discharge the insolvent.

Rule discharged.

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ZACHARIAH
SMITH.

INSOLVENT DEBTORS' COURT.

December 4, 1847.

(Before MR. COMMISSIONER HARRIS.)

*Protection Case.**Re RICHARD CALLIS.**Breach of Trust.*

Under the stat. 1 & 2 Vict. c. 110, in cases of insolvents who are defaulters, the Court deems it necessary on the part of the opposition to prove something more than a simple deficiency of accounts—something to evince a guilty mind in the person whose deficiency of account is charged as an offence, and Semble, that, under the protection statutes, the Court will judge the malus animus of an insolvent from the evidence adduced.

Re RICHARD CALLIS.

THIS insolvent was a broker and collector of rents. For three or four years he had been employed by Mr. McLoughlin to collect rents, and on a balance of accounts, made in July last, the insolvent was found to be indebted in more than 20*l.* to the widow and administratrix of McLoughlin, for whom he had also collected debts after the death of her husband, for which an action was brought.

Nichols opposed for McLoughlin, and said that the Commissioner should not name a day for making a final order, on the ground that the debt was contracted by a breach of trust. The duty of the insolvent was to collect the rents and pay the amount over to the employer, deducting his commission. Here the insolvent had received the money and spent it for his own purposes.

Dowse, for the insolvent, submitted that this was not a case where the Court should refuse to name a day for making the final order. The duties of the insolvent were more extensive than as stated by Mr. Nichols. By referring to the accounts filed, it appeared that the insolvent paid money for various matters according to the order of McLoughlin, and was also entitled to charge for his attendances, &c. relating to McLoughlin's affairs. By the practice of this Court, it was always deemed necessary on the part of an opposing creditor to prove something more than a simple deficiency of accounts—something to evince a guilty mind in the person whose deficiency is charged as an offence.

MR. COMMISSIONER HARRIS.—I am of opinion that this debt was contracted by a breach of trust, and therefore refuse to name a day for making the final order.

INSOLVENT DEBTORS' COURT.

November 27, 1847.

(Before MR. COMMISSIONER HARRIS.)

Protection Case.

Re RICHARD HOUSE.

Order for Payment—Warrant of Commitment.

An order for payment of a debt by instalments obtained upon a judgment recovered in a County Court, being produced, Held, that this Court may grant protection against an order for payment by instalments, although it cannot against an order or warrant of commitment.

COOKE appeared for the insolvent.—The insolvent was opposed by a creditor, who handed in an order for the payment by instalments of his debt, which he had obtained in the County Court of Shoreditch. He objected that the insolvent could not be protected, as he had obtained that order before he petitioned the Court.

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HOUSE.*

MR. COMMISSIONER HARRIS, upon looking at the document, observed that it appeared to be an order upon which the insolvent might have been committed on the very day his default was proved. As the order was dated before the insolvent presented a petition, had he power to grant protection?

Cooke inquired the nature of the document.

MR. COMMISSIONER HARRIS said, that it was not the original judgment, but an order for payment upon a judgment antecedently recovered.

Cooke.—Then, before this Court is deprived of jurisdiction, this man must be regularly summoned by the County Court to show cause why he does not pay. Many persons were under an impression that this Court could not discharge from an order for payment by instalments obtained upon a judgment recovered in a County Court; but that was a mistake. The document produced was not a warrant of committal, but simply an order for payment by instalments, and until the defendant had been summoned to show cause why he did not pay, and a warrant of committal was actually made out, that Court could grant protection. The 102nd section of the County Courts Act (9 & 10 Vict. c. 95) enacted, “that when any order of commitment shall have been made as

Re RICHARD House. aforesaid, &c. the gaoler or keeper of every gaol, house of correction, and prison mentioned in any such order shall be bound to receive and keep the defendant, until discharged under the provisions of this Act, or otherwise in due course of law, and no protection, order, or certificate, granted by any Court of Bankruptcy or for the Relief of Insolvent Debtors, shall be available to discharge any defendant from any commitment under such last-mentioned order." The Court would see that it was only in the case of an order of commitment, not on a mere order for payment, that this Court or the Court of Bankruptcy could not interfere. Here there was simply a judgment with an order for payment by instalments. There was no more in that order than there was in any judgment pronounced in any of the Courts at Westminster. The process was this:—By the 92nd section the Judge of the County Court might make an order for payment by instalments, and in the event of default he might, by the 94th and 95th sections, award execution. The 96th section proceeded by specifying what goods might be taken in execution; and, finally, after showing how the order might be operated upon, the Act proceeded in the 102nd section to enact that, when once a defendant was imprisoned, neither that Court nor the Court of Bankruptcy should interfere. The 103rd section went on still further to enact that the imprisonment of a defendant should not operate as a satisfaction or extinguishment of the debt, or to deprive the plaintiff of any right to take out execution against his goods and chattels at any future period. All that proceeding had reference to the 92nd section, and it was clear that it was only in the event of actual imprisonment, or the production of a warrant of committal, that this Court could not interfere.

MR. COMMISSIONER HARRIS said, that the insolvent was not committed, and the paper produced by the opposing creditor did not turn out to be an order of commitment. There was then nothing in that order to prevent his proceeding in this Court.

The case was adjourned for amendments.

INSOLVENT DEBTORS' COURT.

August 5, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re JAMES HOOKER.**Assets of Insolvent.*

The assets of the estate of a deceased insolvent being paid into Court are claimed by the administratrix and next-of-kin, who offer one-third to the creditors. The assignees claim payment in full. How are the assets to be apportioned?

THIS was an application by the administratrix and next-of-kin of an insolvent, deceased, and whose debts were still unsatisfied, to have paid to them the whole or a portion of the assets of his estate, which had been transmitted from abroad, and placed at the disposal of the Court.

Re JAMES HOOKER.

Cooke, who appeared for the insolvent's widow, who was administratrix, and for the next-of-kin, stated the facts:—James Hooker, the deceased insolvent, some time after taking the benefit of the Act, went to Hong-Kong, and with another party went into business. Subsequently he removed to Macao, where he died of a fever, leaving his affairs, which were of a very complicated nature, in an unsettled state; but they were ultimately wound up by the proper authorities, his debts paid, and the balance transmitted, by order of the Supreme Court in the colony, to this (Insolvent Debtors') Court in the form of a bill of exchange for 1,357*l.*, being the total assets of his estate. The insolvent had left a father and two sisters, and a widow, who had taken out letters of administration. She was by law entitled to one-half, but there were debts in the schedule amounting to 752*l.* 8*s.* 11*d.* That sum might be reduced considerably, upon investigation. Now, with reference to the course to be pursued in satisfying these claims, suppose the property was in the hands of the administratrix, the only course open to the creditors would be under the 87th section of the Act (1 & 2 Vict. c. 110), for the Court to allow execution to issue upon a judgment duly entered up. However, in this case there was no judgment. The only course provided under this Act of Parliament therefore failed. The creditors had commenced proceedings in equity, but as that would be an exhausting process, and the help obtained would be purchased at so dear a rate that all parties would suffer, was it not much better for him to say, if you on your side will come to some fair arrangement, I will waive my

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legal objection that you have no right to touch this fund, under the (Insolvent) Act of Parliament, without my consent? There were two interests here, which he represented, the widow, who was administratrix, and the next-of-kin. Now the usual practice of that Court, with respect to after-acquired property, was, to take one-third of it for the creditors, having respect to the equitable rights of all parties concerned. In accordance with practice, he proposed that one-third of the assets of the insolvent's estate, namely, 452*l.* 9*s.*, be given to the creditors, which, upon the total amount of debts entered in the schedule, 752*l.* 8*s.* 1*ld.* would give them more than ten shillings in the pound.

Towne, solicitor for the assignees, objected to take one-third, but would accept two-thirds.

Douse, who appeared for Wm. Price, a judgment creditor, thought the offer of Mr. Cooke a very fair one, and would accept that arrangement.

Nichols, who showed cause against the rule for the assignees, said, that the creditors were entitled to twenty shillings in the pound. Unless all the creditors consented, he doubted whether the assignees had power to accept less. As to the fact of there being no judgment, that was immaterial. It was true that a power of attorney must be given in the lifetime of the party who gave it. In this case the party was dead. But under the 87th section, the order of that Court to enter up judgment would be as valid after, as it was previous to, the decease of an insolvent. The words of that section were "the order of the said Court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment shall have the force of a recognizance; and if at any time it shall appear to the satisfaction of the said Court that such prisoner is of ability to pay such debts, or any part thereof, or is dead, leaving assets for that purpose, the said Court may permit execution to be taken out upon such judgment for such sum as under all the circumstances of the case the said Court shall order." These words, "shall be a sufficient authority to the proper officer," were of the most general signification, and were as binding and as authoritative after death as before it. That the words fully contemplated, and extended to, the death of an insolvent was obvious, for there were frequently no funds in his lifetime, and if the Court was to hold that judgment could not be entered up after death, creditors would be deprived in that event of their property, although there was no laches on their part or on that of the Court. But he would further call the attention of the Court to the terms on which the money was transmitted to the Court. The letter from the registrar of the Court abroad transmitting it said, that the Court was to hold it for the parties entitled to it. The words of that letter were, that the Court should dispose of it "as might be just to all parties."

The CHIEF COMMISSIONER observed, that those words would not give the Court authority to do that which by law it could not do.

Nichols submitted that by law the creditors should be paid before the next-of-kin received anything. That an intestate's property must be applied first to the satisfaction of his debts was as clear a proposition as any in law. Were the debts in this schedule debts due by the intestate? The Court of Common Pleas had held, that the discharge of this Court was merely from imprisonment; the debts remained. In the Court of Bankruptcy they made applicants include debts contained in their schedules in this Court, and petitions had often been dismissed because, with that addition, the amount of their debts was above 300*l.* The debts entered in the schedules in this Court were, therefore, debts legally and equitably due to all purposes. The legal and equitable rights of the parties gave the true notion and proper construction to the words in the letter, "as was just to all parties." The sympathy and feeling of parties should not be allowed to interfere with what was just. What was the ordinary course pursued by law under such circumstances? Suppose a tradesman, a butcher, for instance, died intestate, his debts were first satisfied, debts due on specialty contracts and on bonds taking priority. That was what was called priority of right, and sympathy or feeling had nothing to do with it.

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The CHIEF COMMISSIONER said, that he need not labour that point, as it was plain this was a legal question, and what might be called the justice or feeling of the case had nothing to do with it.

Nichols said, that the question there must be settled by equity, and a Court of Equity, as the cases showed, would order the creditors to be satisfied before the widow and next-of-kin received a farthing. That the debts in that Court were just as much debts before death as afterwards, was plain, because, supposing a landlord inserted a debt for rent in the schedule of an insolvent, if he returned to the same house the landlord might seize his goods by distress for the same debt, because that special remedy was not taken from him by the Act.

The CHIEF COMMISSIONER observed that, supposing it was so, the Act provided that, with respect to after-acquired property, the only mode of reaching it was by entering up judgment; but if there was none, how could that be done?

Nichols said that it was not necessary here. This case was distinguished from all others that he recollects, for the funds to be reached were in Court. From the spirit of the Act it was clear that if a man left property, being insolvent, that Court was required to order its distribution, or so much of it as should appear to be just and equitable, amongst his creditors. His death, supposing him in a situation to satisfy his creditors, in no way remitted that obligation. A case of this kind, so far as he knew, never occurred before. The insolvent's debts at Hong-Kong were all paid, and all the debts and liabilities abroad were paid and satisfied; but the deceased (insolvent) left debts in his schedule in this country to the amount of between 700*l.* and 800*l.*, when the surplus of his property left and in Court amounts to between 1,300*l.* and 1,400*l.*; the insolvent's widow was provided for. Under

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these circumstances, had not the creditors a priority over the next-of-kin in equity as well as in law? If the insolvent were living, he could not have given his property to them before satisfying his debts, and upon what principle was it that this power could be exercised after his death? He submitted that there was power under the Act, if not under the terms of the letter, to order the distribution of the money amongst the creditors,—if not, that the Court should hold it till the terms of its distribution were settled by a Court of Equity. Proceedings had been taken in equity and an injunction had been granted, but it had been dissolved, because they swore that the money was in this Court, which Vice-Chancellor Knight Bruce held to be a Court of competent jurisdiction. Upon that presumption, and by law, the money was here, and he submitted that there should be no delay in its distribution amongst the creditors.

Creswell contended that the Court had jurisdiction, although judgment had not been entered up.

Dowse again, on the part of a creditor, elected to accept Mr. Cooke's offer, as it would put money in the hands of creditors which might otherwise be spent in litigation.

Cooke suggested that it would perhaps facilitate the decision of the Court if all the creditors were called upon to prove the debts inserted in the schedule, as some of the debts were said to be too large. There was one debt which was put down at 200*l.* which really only a little exceeded 100*l.* He hoped that the suggestion of Vice-Chancellor Knight Bruce, that this Court was the proper Court for the distribution of the assets, would be acted upon. He wished to keep the money out of Chancery, and suggested that all parties should be bound by previous assent to abide by the decision of this Court. He pledged his word that judgment could not be entered up against a deceased insolvent.

The CHIEF COMMISSIONER wished to see a case in point.

Cooke said that a case was to be found in Barnewell and Adolphus, and pledged himself to produce it. Upon reflection, and in consequence of a bill having been filed in Chancery, he now varied his application. He thought that the Court could not advise its officer to pay out the money, as they were only trustees. The money ought to be considered to be in the hands of the administratrix, and that this application should refer to an arrangement *inter vivos*. There should be no difference in consequence of its being *in mortuum*. The Court, in determining similar applications *inter vivos*, always took into consideration, as an element in its decision, the situation of the family of the insolvent. Taking, then, the ordinary course of proceeding *inter vivos* as their guide, the administratrix was equally bound with the living man to pay his debts. In these cases the Court never took the whole assets. The Court tempered its judgment with other considerations, and mercy was not forgotten. The Court would not forget the expense to which the widow had already been put, as administratrix, to maintain her claim.

Nichols read the letter from the Supreme Court abroad, and commented upon its terms in reference to the deposit of the money.

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Cooke said that he could not be in a better position than that which he was willing to concede; namely, that the application should be dealt with in the same manner as if a judgment had been obtained.

The CHIEF COMMISSIONER would give no decision at present, but ordered the matter to stand over. Creditors in the meantime to be called upon to prove their debts.

INSOLVENT DEBTORS' COURT.

November 9, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Re JAMES HOOKER.

Proof of Debt—Interest.

An order is made by the Court for creditors to prove their debts preparatory to a dividend. Certain creditors do not appear when summoned in the usual way. The auditor is justified in omitting their names from his report. He is justified also in omitting all calculations for interest on specialty debts. Interest is not allowed beyond the date of the petition.

IN this case (a) the insolvent was dead, and the assets of his estate paid into Court by the Supreme Court of Hong-Kong. In August last, preparatory to a dividend, the Court directed a proof of debts. That had been done, and the auditor's report presented to the Court, but, being excepted to on behalf of the creditors, the disputed points were to-day argued before the Court, pursuant to the 1 & 2 Vict. c. 110, s. 62, which enacts as follows:—"Provided always, that if in any case it shall appear expedient that a proof of any debt or debts shall be required to be made at an earlier or other period than as aforesaid, it shall be lawful at any time for the said Court, by notice as may be directed in that behalf, to cause all or any of the creditors to prove their debts in such manner as the said Court, or a commissioner thereof, shall require, and to decide upon such debts, and the right to receive dividends thereupon, and to do all things requisite thereto, as aforesaid."

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(a) See *ante*, p. 55.

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Nichols was for the assignee, and
Cooke for the administratrix.

Nichols excepted, upon two grounds, against the auditor's report. He objected, first, that the auditor had not allowed anything for interest upon a specialty debt. Mr. T. Bennet Sturgeon, the assignee, was put down in the report as a creditor for 215*l. 9s. 4d.* That was a specialty debt, being upon an award, and as such carried interest, which he had allowed up to that date.

Cooke said that the question had been argued before, but the Court would not allow interest beyond the date of the petition.

Nichols said that the point had been argued, but he did not recollect whether it was in reference to a simple contract debt or a specialty debt.

The CHIEF COMMISSIONER inquired if any reported case could be produced upon this point.

Cooke could not refer to any report, but he recollects arguing the point himself upon the rule of law that a judgment debt should bear 4 per cent. interest. In the case to which he referred it was a judgment debt, and, of course, *à fortiori*, if it does not apply to that, it does not to this.

Nichols said that the other objection was, that five creditors were omitted from the report whose names appeared in the schedule. As there was no evidence impeaching their right as creditors, or disqualifying them from receiving dividends, he submitted that their names ought not to have been struck out. The mode of proving debts was specifically pointed out by the Act of Parliament.

Cooke said that the 1 & 2 Vict. c. 110, governed the proof of debts in all schedules that have been filed in this Court before or after the passing of that Act.

Nichols said that the 62nd section governed the distribution of dividends. They ought to have been admitted, because their names and debts were respectively inserted in the schedule, and because there was no evidence to disqualify them, or show that they were dead or bankrupts, or that their debts had been paid. He contended that the Act of Parliament did not throw the burden of proving that upon the assignee or creditors. It was for the other party to do so. The burden of proof was upon the insolvent or administratrix, not upon the creditors. He submitted that in these particulars the report was incorrect.

Cooke said that, with respect to these matters, there was a rule long established in practice in the office: that rule was, that every person on coming to receive a dividend, or to claim to receive one, should, if called upon, be prepared to substantiate his debt. That was a just and reasonable rule. It should not depend upon the mere, perhaps accidental, admission of the debt in the schedule. He marvelled that Mr. Towne, who attended the proof of debts on behalf of these creditors, did not produce some affidavits. The Court had directed the debts to be proved, and the auditor had very properly struck out these creditors, because they did not come to

prove their debts as the Court directed. Their debts might have been paid, by operation of law, by a set-off, or they might be bankrupts.

Re JAMES HOOKER.

The CHIEF COMMISSIONER said that his present impression was, that these five persons ought to have proved their debts. He inquired whether there was any arrangement come to between the parties as to the distribution of these assets.

Nichols was not instructed to assent to any arrangement on the part of the creditors. It must be left entirely to the judgment of the Court as to the order that would be made.

The COURT directed the matter to stand for judgment on the 24th instant.

The CHIEF COMMISSIONER intimated on a subsequent day that he thought there was nothing in the objections urged by the learned counsel to the auditor's report; but the judgment to be given would render a formal decision on these points unnecessary.

INSOLVENT DEBTORS' COURT.

November 24, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Re JAMES HOOKER. (a)

Assets of Insolvent.

The assets of the estate of a deceased insolvent being paid into Court, are claimed by the administratrix and next-of-kin, who offer one-third to the creditors. The assignees claim payment in full. How are the assets to be apportioned?

Semble, the creditors cannot claim payment of their unsatisfied debts where judgment has not been entered up before the death of the insolvent.

THIS was an application by the administratrix and next-of-kin of an insolvent, deceased, and whose debts were still unsatisfied, to have paid to them the whole or a portion of the assets of his estate, which had been transmitted from abroad and placed at the disposal of the Court. The point was fully argued by counsel on the 5th of August and the 27th of October, after which it was adjourned for the consideration of the learned Commissioner, and ordered to stand to-day for judgment.

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(a) See *ante*, pp. 55 and 59.

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The CHIEF COMMISSIONER said that his mind was now made up upon the subject of this application. It was certainly a very remarkable case, the like of which had not occurred before in administering the laws of that Court. It was an application by the administratrix of James Hooker, an insolvent, for the payment to her of a sum of money now in the hands of the provisional assignee, being assets of the estate of her deceased husband. A rule was obtained on the 5th of May last against the provisional assignee of that Court and Mr. Sturgeon, the sub-assignee, "to show cause why the provisional assignee should not pay over the sum of 1,357*l.* 9*s.* received by him from the registrar of the Supreme Court at Hong-Kong, or such other sum as the Court might order, to the administratrix of the goods, chattels, and credits of the said James Hooker, deceased, there being no judgment entered on the warrant of attorney executed by the insolvent at the time of his adjudication." A brief outline of the case might be thus given :—In September 1834, James Hooker applied to that Court, but being opposed, the Court, after hearing the opposition, remanded him for a certain period. That remand was obtained under the 57 Geo. 4, c. 57, which was the Act then in operation; and he executed, previous to the adjudication being pronounced, a warrant of attorney, to authorize the entering up of a judgment for the amount of debts in his schedule, according to the provisions of that statute. An assignee was chosen, but nothing was got in; so that no judgment was entered up on the warrant of attorney which he had executed. What became of the insolvent, whether his detaining creditor let him out of custody, or how long he remained in prison, did not appear; but, subsequently he went over to China, and after establishing himself in business as a provision merchant and hotel-keeper, he died at Macao in 1841, intestate. His widow took out letters of administration. After a great deal of trouble and inquiries by the authorities abroad, the result was that all the insolvent's debts were paid, and there remained in Court at Hong-Kong a sum of 1,357*l.* and a few shillings. Upon this appearing to the Supreme Court, they, with great propriety, as it appeared to him, under the circumstances, transmitted it to that Court, and then the administratrix applied for the rule which he had read. Notice was given to the assignees and creditors above 5*l.* and there was a general advertisement, so that all interested had due notice. The case was argued before him on the part of the administratrix and the assignees, and some persons had appeared for the creditors. It was now his duty to state their decision. He said their decision, because he had consulted the rest of the Court, and he was happy to say that all his learned brothers concurred in his opinion. It was well known that all the property of an insolvent passed under the assignment to the assignee, and he could deal with it up to the adjudication; after that, the power of the assignee ceased as to future-acquired property; but there had been in all the Acts of Parliament certain provisions enabling

the creditors to deal with that property. The Act 57 Geo. 4, c. 57, was then the law, and the sections which related to this kind of property were the 57th, 58th, and 59th, and they were almost identical with the 87th, 88th, and 89th of the existing law (1 & 2 Vict. c. 110), and nearly alike to the clauses in the preceding Acts of Parliament. Amidst all the changes that had taken place in the law by the various Acts that had been prepared, that part relating to this matter had remained untouched. The 57th section of the 57 Geo. 4 provided that before an adjudication shall be pronounced, an insolvent shall execute a warrant of attorney to confess judgment for the amount of debts in his schedule, and it was provided that if at any future time it shall appear to the Court that the insolvent is of ability to pay such debts or is dead, leaving assets for that purpose, then it shall be competent for that Court to set aside for the creditors such an amount of that property as under all the circumstances shall appear just and reasonable; but the whole of that section depended upon a judgment being entered up; for the Act provided, "that if at any time it shall appear to the satisfaction of the Court that such prisoner is of ability to pay such debts or any part thereof, or that he is dead, leaving assets for that purpose, the said Court may permit execution to be taken out *upon such judgment*, for such sum of money as under all the circumstances of the case the said Court shall order;" so that the only power an assignee had of realising future-acquired property was upon judgment being entered up on the warrant of attorney signed by the party at the time of his adjudication. If from accident, laches, or any other cause, no judgment was entered up, it followed that no execution could issue. If there was no judgment, of course there could be no execution. That was not a mere isolated opinion of his own, for some time ago the point was solemnly argued before the Court of Queen's Bench, in the case of *Harding and another v. Forsyth*, 1 Adol. & Ell. N.S. 177. In that case the point was argued at length, and for the information of the parties he would read the report:—

Re JAMES HOOKER.

"January 21, 1841.

" Judgment entered up on a warrant of attorney executed by insolvent in pursuance of 7 Geo. 4, c. 57, s. 57, after death of insolvent, set aside.
" The Court afterwards refused to enter up judgment *nunc pro tunc*, as of a period anterior to the death.
" *W. H. Watson* last Trinity Term obtained a rule to show cause why the judgment signed on a warrant of attorney in this cause, and all subsequent proceedings, should not be set aside for irregularity, on the ground that the defendant had died several years before the judgment. On March 24th, 1827, Francis Forsyth was discharged under the Insolvent Debtors' Act (7 Geo. 4, c. 57). Before discharge he executed a warrant of attorney (under section 57) to confess judgment for 5,070*l.* at the suit of the provisional

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assignee, his successors and assigns. The insolvent's estate was assigned by the provisional assignee to Harden and Gell, the now plaintiffs. On August 30, 1833, *insolvent died*, leaving executors, who proved his will. On December 24, 1839, an order of the Insolvent Debtors' Court was obtained for entering up judgment. The order directed that judgment should '*be forthwith entered up*' in the Court of Queen's Bench against the said insolvent debtor, and, at the suit of Harden and Gell, assignees, &c. for 2,536*l.* being the amount of debts stated in the insolvent's schedule, judgment was entered upon *December 31, 1839, without any order of the Court of Queen's Bench.* On March 4, 1840, the assignees obtained a rule in the Insolvent Debtors' Court, calling on the executors to show cause why execution should not be taken out for 2,400*l.* or such other sum as that Court might order, Forsyth (*as it was alleged*) *having died* leaving assets *sufficient to pay the debts* mentioned in his schedule. The rule coming on for argument, the judgment was objected to as irregular. The Insolvent Debtors' Court, on May 27, 1840, made the rule absolute for execution to issue on the judgment for 515*l.* but ordered that such execution should not be put in force till further order of that Court, and they said that they had no power to determine whether the judgment signed on the warrant of attorney was good or bad, that being a question entirely for the Court of Queen's Bench. A summons was then taken out by the executors to show cause before a Judge at chambers *why the judgment and subsequent proceedings should not be set aside for irregularity.* The learned Judge, upon the hearing, declined to make an order, considering the matter too important to be decided on summons.

"Sir J. Campbell (Att.-Gen.) and Hoggins showed cause.

"Sir W. Follett and Watson, *contra*, were stopped by the Court.

"LORD DENMAN.—I thought at first that the power given by sect. 57, to proceed after the party's death, had been extended to the entering up judgment, but that is certainly omitted. The rule, therefore, must be made absolute.

"LITTLEDALE, J.—This Court does, on special cause appearing, give leave to enter up judgment *nunc pro tunc*, and where judgment was entered up on an old warrant of attorney, on affidavit that the party was alive on the first day of term, it was as if the leave had been given on that day. But nothing equivalent has been done in this case.

"PATTESON, J.—It is clear that the Court has jurisdiction over this warrant of attorney, and I think the effect of the statute is to give the Insolvent Debtors' Court power to order execution, *but not to authorize entering up judgment after the insolvent's death.*

"COLERIDGE, J.—This Court has jurisdiction over this warrant of attorney, because the judgment is of this Court. But I am clearly of opinion that the Insolvent Debtors' Court has not the power which has been asserted either by the statute or general principles. The case of an old warrant of attorney is against the plaintiffs. The party was sworn to have been alive on the first day of term,

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but then the judgment bore date of that day. Now the practice is altered, and it must appear that the party is alive when the affidavit is made for the purpose of obtaining leave. I doubted on the hearing at chambers whether the sole proceeding on the warrant of attorney must not be considered as flowing from the original transaction in the Insolvent Debtors' Court, and as a mere machinery for the purpose of the execution. But I think that is not so.

"Rule absolute."

"Sir J. Campbell, on a subsequent day of the Term (Jan. 25), moved for a rule to show cause why judgment should not be entered up as of a term anterior to the insolvent's death, on an affidavit which explained the delay on the part of the assignees, by showing that the property which it was intended to take in execution did not become assets until the insolvent died. He contended that the Court might properly make such an order under 7 Geo. 4, c. 57, s. 57. [COLE RIDGE, J.—Ought not the leave to be applied for in the Insolvent Debtors' Court?] The orders they have already made are sufficient for this Court to act upon. *"Cur. adv. vult."*

(*"Jan. 28."*)—LORD DENMAN.—We are of opinion that the application cannot be granted.

"Rule refused."

Now in that case, for several years after the death of the insolvent; namely, from 1830 to 1839, no judgment was entered up, so here the fact was the same, but this was, if possible, a stronger case, from longer time having elapsed from the decease of the insolvent. (James Hooker was heard on his petition in 1834, and remanded for eight months, and he died in 1841. The money was transmitted to this Court from Hong-Kong on the 23rd of March, 1847.) In that case the insolvent died, leaving assets to pay his debts. That was so here also. The points were the same, and the question was brought before the Court of Queen's Bench, and argued by two of the ablest men that ever adorned the Bar of this country. In that case no judgment was entered up before the death of the insolvent. In this case also no judgment was entered up. The whole authority and power of the Court under the Act of Parliament rested upon the fact of a judgment having been entered up previous to an insolvent's death; and execution could not issue unless that had been done. But there were two other sections relating to property—to future-acquired property. The 57th section of that Act (7 Geo. 4, c. 57), provides that "if at any time it shall appear that such prisoner is of ability to pay such debts, or any part thereof, or that he or she is dead, leaving assets for that purpose, the Court may admit execution to be taken out *upon such judgment.*" The 58th section provides thus: "In case any person shall, after he has had the benefit of this Act, become entitled to any stock in the public funds, or any bills of exchange, promissory notes, bank notes, or other choses in action, or other property, which by law cannot be taken in execution under the said judgment, and he shall refuse to

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convey, or assign, or transfer the same, it shall be lawful for the assignees to apply by petition in a summary way to the Court, and to pray that he may be taken and committed to custody." The only remedy given to the creditors under that clause was, to commit the insolvent; but there was no way of carrying out that provision for commitment here, as the insolvent was dead. There was still another clause affecting the point, for it appeared that the Legislature had been anxious to give creditors a control over the after-acquired property of an insolvent. The 59th section provides, " And in case any persons, body politic or corporate, shall, after any insolvent shall have had the benefit of this Act, become possessed of, or have under their power or control, any stock in the public funds, or any legacy money due or growing due, bills of exchange, promissory notes, bank notes, securities for money, goods and chattels, or any other property whatsoever belonging to such insolvent, or held in trust for his use and benefit, or to which he shall be in any way entitled, or in case any such persons, &c. shall be indebted to such insolvent, it shall be lawful for the Court to cause notice to be given to such persons, &c. to hold and retain the said property till it shall make further order, and it shall be lawful for the Court further to order such persons, &c. to deliver over such property, and to pay such debts as aforesaid, or any part thereof, to the provisional or other assignee." That property was to be retained for the general benefit of such creditors as were entitled to claim under that judgment, entered up by order of this Court. He could not see how that clause was to be applied in this case, where there was no judgment entered up, nor ever had been. Looking at this case in all its bearings, and in connexion with the first section he had named (57th), and considering that it turned entirely upon the fact of judgment being entered up so that execution might issue; looking also at the 58th section, which, so to speak, was quite personal to the insolvent; and looking, lastly, at the 59th section, which enabled assignees to get at property in the hands of third parties belonging to an insolvent for creditors who have come in under a judgment duly entered up, and seeing that, as no judgment was entered up, that section could not be acted upon, he was of opinion that the rule must be made absolute, and the property now in the hands of the provisional assignee returned to the administratrix of the insolvent. In this decision he was happy to say his learned brothers had, after consideration, expressed their entire concurrence.

Rule absolute.

INSOLVENT DEBTORS' COURT.

January 10, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

*Re C. W. ADAMS.**Vesting Order.*

When there is a claim outstanding against an estate, the Court is unwilling to annul the vesting order.

NICHOLS showed cause against a rule *nisi* obtained upon a former day on behalf of the insolvent, for the annulling of the vesting order. A *caveat* had been lodged in the office by a creditor, who objected to the insolvent's obtaining repossession of the property which the provisional assignee had a claim upon until his debts were paid.

Re C. W. ADAMS.

MR. COMMISSIONER PHILLIPS directed the rule to be enlarged for a month, to give the insolvent time to settle with his creditors; and if by that time the debts were not paid, the rule to be discharged.

INSOLVENT DEBTORS' COURT.

January 17, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

*Re EDWARD RICHARD ROBSON LETTON.**Assignees—Costs of Appearance.*

AN application to the Court for an attachment against an assignee for not filing an account will not necessarily fall to the ground, although it should turn out that the applicant is not a creditor.

Re EDWARD RICHARD ROBSON LETTON.

Nichols had obtained a rule *nisi* on the 13th of December, for an attachment against the assignee for not filing his account pursuant to an order of the Court to that effect. To-day

Dowse moved "to discharge the rule obtained by Mr. Buchanan on behalf of Alexander Bain, calling upon Charles Thomas Goodale

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to pass his accounts, he, the said Alexander Bain, being no creditor." At the date when the rule *nisi* was obtained by the applicant he was not a creditor, and, if necessary, an affidavit would be produced to that effect. Under those circumstances he submitted that the motion fell to the ground, and consequently there could be no objection to discharging the rule.

Nichols called upon his learned friend to produce his affidavit that his client was not a creditor.

MR. COMMISSIONER PHILLIPS said, if there was an affidavit that the applicant's debt had been paid, it might be produced; but independently of such an affidavit he was of opinion that the Court, of its own motion, could sustain this proceeding, and direct the provisional assignee to call upon the creditor's assignee to produce his account. As there appeared to be some doubt whether this application could be upheld, if it should be proved that the applicant was no creditor, he would consult the Chief Commissioner.

MR. COMMISSIONER PHILLIPS, in reply to his written communication, received an answer from the Chief Commissioner to this effect:—"I am of opinion that if the notice of the Court is called to any default in an assignee in not filing his accounts, it has power to commit him, if necessary, either on the application of a creditor or not." Here is an assignee who does not affirm that he has discharged his duty, but says that he is called upon in an informal manner. According to the learned Chief Commissioner's opinion, and according to his own opinion, it did not signify that the applicant to the Court was not a creditor. It is sufficient to bring to the knowledge of the Court that the statute has been disobeyed. He should consult his brother Commissioners on that point. All the assignee had to do was to file a short account, showing what he had received, and what he had paid; and to enable him to do that, he would grant him the additional indulgence of allowing the rule to be enlarged until Friday next, when, if not obeyed, it would be made absolute.

The costs of the day to be paid.

January 21.

MR. COMMISSIONER PHILLIPS intimated that he had consulted his brother Commissioners upon the point involved in this case, and their opinion was the same as that which he had expressed upon the former occasion, namely, that in a case of this description there was not the least necessity for the applicant being a creditor. The Court of its own motion had full power at any time to call upon an assignee for his account.

Dowse intimated to the Court that the account had been filed. The rule would therefore be discharged.

Nichols applied for the costs of appearance that day as against the assignee personally.

MR. COMMISSIONER PHILLIPS observed, that the rule was directed to be discharged if the account was filed by to-day.

Nichols submitted that the insolvent was in contempt for not obeying the rule of the 14th of November, ordering the assignee to file his account forthwith, and the contempt was complete when he obtained the rule *nisi* for his commitment. The costs of the proceedings rendered necessary by that contempt should fall upon him. The practice of the Court was to allow fourteen or sixteen days to an assignee for the filing of his account, and the uniform practice of the Court was always to give the creditor the costs of coming here, which were incurred in consequence of an assignee's contumacy. If that was not so, look at the hardship upon the creditors. What creditor would ever come there if he had to bear all the expense? If he would have the kindness to ask the Chief Commissioner, he would find the practice to be as he stated.

Dowse said that the 27th section gave the Court a limited power as to costs. It "provided always, that the said Court, or any commissioner thereof, shall not have the power of awarding costs against any person or persons whomsoever, except in such cases only where such costs are hereinafter expressly mentioned and permitted to be awarded by this Act." The costs permitted to be awarded were those of successful opposing creditors. In this case the rule for an attachment would bear date to-day. Now the accounts were filed last Saturday. There was no express power in the Act to award the costs against the assignee.

MR. COMMISSIONER PHILLIPS said that it was an indulgence that the rule was not made absolute in the first instance.

Nichols repeated that if the creditors were to be saddled with the expense of coming personally before the Court in cases of this kind, no creditors would ever come, and insolvent's estates would suffer in consequence. He submitted that the assignee was in contempt for not obeying the original rule. He was desirous that the rule should be made absolute, and remain in the office for a fortnight.

MR. COMMISSIONER PHILLIPS would consult his brother commissioners.

January 27.

MR. COMMISSIONER PHILLIPS intimated that he had consulted the Chief Commissioner, and he was of opinion that the costs of compelling the assignee to discharge his duty should be paid. In that opinion he concurred. *Rule discharged with costs.*

*Re EDWARD
RICHARD
ROBSON
LETTON.*

INSOLVENT DEBTORS' COURT.

January 24, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

Re ROBERT CULLYFORD.*Assignees.*

Creditors of an insolvent who hold mortgages, the benefit of which they will not consent to waive, are not allowed to vote in the nomination of assignees.

A creditor who is a near relative of an insolvent will not be appointed assignee.

Re CULLYFORD. DOWSE obtained a rule *nisi* upon a former day for the appointment of Mr. Maynard as assignee of the insolvent's estate. Subsequently a *caveat* was lodged in the office against his appointment by Gilham, attorney, and the rule was served upon him. To-day

Dowse moved to make the rule absolute.

Cooke, on behalf of Gilham, objected to the confirmation of Mr. Maynard as assignee. Only three creditors had signed the nomination paper, and two of them were mortgagees. The other was only a creditor for 1*l.* 18*s.* 11*d.* Mortgage creditors had no right to have a voice in the nomination of assignees till they had given up their securities, or till after an account had been taken, when they could vote or prove for the balance.

Dowse submitted that it was not an inexorable rule. Where the mortgage creditor's debts were very large, and the simple contract creditor's claims were very small—in fact, when there were special circumstances,—the Court deviated from the rule.

Cooke said that creditors holding mortgages the value of which was unascertained, could not vote at all. How did they know but they might have a surplus to pay into Court?

MR. COMMISSIONER PHILLIPS referred to Cooke's Insolvency Practice, and read—"The Court will not in general appoint a creditor who has a mortgage or other available security for his debt, or whose interest shall appear to be opposed to, or be distinct from, those of the body of the creditors, unless he shall consent to waive the benefit of his security, and place himself upon an equality with the rest of the creditors." He wished to know whether these creditors would waive their securities?

Dowse said he could not advise them to do that.

Cooke said that there was a specific provision in the statute on the subject. The 52nd section of the 1 & 2 Vict. c. 110, enacted, that all matters wherein creditors shall vote, or wherein the assent or dissent of creditors shall be exercised in pursuance of or in carrying into effect this Act, every creditor shall be accounted such in respect of such amount only as upon an account fairly stated

between the parties, *after allowing the value of mortgaged property, and other such available securities and liens, shall appear to be the balance due.*" The Court would see that mortgage creditors were allowed to vote only in respect of such amount as was due after a balance had been struck between the parties. That balance had not been ascertained in this case, therefore the rule must be discharged.

MR. COMMISSIONER PHILLIPS.—The question now is, whether I shall appoint a man who is recommended by one creditor representing 1*l.* 18*s.* 11*d.* I certainly will not. *Rule discharged.*

Cooke moved to appoint R. Cullyford, a brother of the insolvent, assignee in the place of Mr. Maynard.

MR. COMMISSIONER PHILLIPS again referred to Cooke's Insolvency Practice, and read—"The Court, in its extreme anxiety to protect the interests of the general body of the creditors, will never, except under very special circumstances, or at the particular desire of the other creditors, appoint a near relative of the insolvent to be assignee." It was somewhat singular that the two applications just made to the Court should be met by the statement of the practice contained in the same paragraph.

Application refused.

INSOLVENT DEBTORS' COURT.

December, 1846.

(Before the CHIEF COMMISSIONER REYNOLDS, and MR. COMMISSIONER PHILLIPS.)

Re GEORGE DODDS.

Bail.

When there is a clear case of remand against an insolvent, he will not be admitted to bail till his hearing.

THIS insolvent's application to be admitted to bail on sureties till his hearing, was opposed by an attorney upon the ground that he had vexatiously defended an action.

Re
GEORGE
DODDS.

The COURT said, that when there was a clear case of remand against an insolvent under the 78th section, such as damages in an action for slander, &c., then the Court would not permit an insolvent to go at large on bail till his hearing.

MR. COMMISSIONER PHILLIPS said, that many circumstances might transpire at the hearing to do away entirely with the vexatious nature of a defence to an action. *Bail accepted.*

INSOLVENT DEBTORS' COURT.

March 19, 1844.

(Before MR. COMMISSIONER HARRIS.)

*Re JAMES RODGER.**Contempt.*

An insolvent imprisoned for contempt by another Court, for any other cause than nonpayment of money, will not be discharged till he has purged himself from that contempt.

*Re
JAMES
RODGER.*

THIS insolvent had carried on business as a tailor, in George-street, Hanover-square, in partnership with his present detaining creditor, who had sued him on a bill of exchange, given by the insolvent to his partner, on account of a private debt. The detaining creditor, being dissatisfied with the conduct of the insolvent, had filed a bill in Chancery, praying for an injunction, to restrain the insolvent from receiving the debts due to the partnership, and from negotiating certain bills of exchange. The injunction was issued, but the insolvent had not put in his answer, and he was committed by the Court of Chancery for a contempt in not answering. The creditor had filed a petition to this Court, praying for a vesting order, which was made; and the insolvent filed his schedule under the order of this Court. He came up now to be heard; but

Cooke, who appeared for the opposing creditor, took an objection *in limine* to the hearing under the 11 Geo. 4 & 1 Will. 4, c. 36, ss. 16, 17, commonly known as Sir Edward Sugden's Act, which provides that where a plaintiff is in custody for contempt for any other cause than nonpayment of money, he shall not be discharged by this Court until he shall have purged himself from such contempt. This insolvent was under an attachment from the Court of Chancery for not filing an answer to a bill in that Court, and he submitted that the insolvent must be relieved from contempt before he could be heard in this Court.

Woodruffe said that the insolvent had filed his schedule on a vesting order obtained by the detaining creditor, and if he had declined to do that he would also have been in contempt in this Court. It was very extraordinary that this same creditor, who compelled him to come into this Court, should now turn round upon him and object to his being heard. He, however, could not controvert the practice of the Court as laid down by his learned friend.

MR. COMMISSIONER HARRIS said that a relief from attachment under the circumstances was a condition precedent to the insolvent's right of petition. As soon as he had filed an answer to the bill in Chancery and was out of contempt, he might come up to be discharged. *The insolvent was remanded in custody.*

Note.—A petitioner is not permitted to be heard who is in custody upon a criminal charge, although he is also in custody for debt, until the criminal charge is disposed of.

INSOLVENT DEBTORS' COURT.

May 31, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS and Mr. COMMISSIONER PHILLIPS.)

*Re DUNCAN JOHN M'KENZIE.**Opposition—Principals—Agents.*

In oppositions by traders against insolvents for contracting debts with them by false representations, under 1 & 2 Vict. c. 110, it is not absolutely necessary in all cases that the principals should attend to make out their case.

THIS insolvent was opposed by *Nicholls* and supported by ^{*Re D. J.*} *M'KENZIE* *Dowse.*

The opposing creditors were Messrs. Proles, Scales, and Co. wine merchants in Mincing-lane. Their complaint was that a debt of 229*l.* 15*s.* 9*d.*, the price of ten butts of wine, had been contracted with them by the insolvent fraudulently, and by false representations.

The town traveller or agent of the firm, Fibbs, who attended on behalf of the opposing creditors, deposed as to what had passed between himself and the insolvent in arranging the transaction. After that, he had an interview with his principals, to whom he communicated the insolvent's conversation, and received directions to complete the bargain for the purchase of the wine, which was accordingly forwarded to the insolvent. These representations made by the insolvent, and upon which his principals had acted, were false.

Dowse objected that neither of the principals in the firm were called to prove the impression made upon their minds by the insolvent's representations. The principals might have acted upon grounds other than those arising from the representations made by the insolvent. A case could not be established against an insolvent in the absence of the creditors.

The CHIEF COMMISSIONER said that the learned counsel had stated the proposition rather too broadly, that the Court could not decide in the absence of the principals. The latter might be ill or abroad for the benefit of health, or other legitimate reasons. As the principals in this case acted after communication with the agent, it was reasonable to suppose that they acted upon his representations.

The COURT remanded the insolvent for eight calendar months from the date of the vesting order, for contracting a debt with the opposing creditors fraudulently.

INSOLVENT DEBTORS' COURT.

February 3, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection case.**Re JOSEPH WHITFIELD COLLIER.**Petition—Untrue Allegation.*

The petition of insolvent contained an allegation that he had not parted with any property not contained within the exceptions named in the statute, during the three months preceding the date of his petition; but this statement having been proved to be untrue, held, that the Court will either dismiss the petition or name no day for a final order.

Re J. W. COLLIER. CRESWELL appeared for the opposing creditor and Douse for the insolvent.

This case was adjourned from a former day.

The statement in the insolvent's petition was, that he had parted with no property (except as allowed by the statute) within three months of the date of filing his petition on the 22nd December, 1847. But it appeared from the schedule that, on the 6th of October, within that period, he had given up possession of his house and lease to his landlord, the latter being forfeited under one of the covenants, if the rent should remain unpaid three days after it was demanded.

These facts appeared in evidence on the 20th of January, when the insolvent came up for his interim order.

The CHIEF COMMISSIONER observed, that the Act of Parliament gave the Court no power to alter the form of the petition, and if it was not in the form prescribed, it must be dismissed. But then came the question, supposing the form to be strictly followed, but the allegations to be untrue, was the petition to be dismissed? He believed that it was not stated in the Act of Parliament that if the allegations in the petition were untrue, or if any allegation was untrue, the petition should be dismissed.

The question was directed to stand for argument this day, when

*Re J. W.
COLLIER.*

Creswell submitted, that as the statement of the insolvent in his petition was false, it must be dismissed. He took the covenant as to forfeiture to be one that was common to every lease, and should therefore proceed at once to argue the legal point involved. He would first begin with the Act of the 5th & 6th year of Her Majesty, the preamble of which recited that "whereas it is expedient to protect from all process against the person such persons as have become indebted without fraud, or gross or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors." He directed the attention of the Court to the words "*so as nevertheless their estates.*" He laid stress upon the words "*so as nevertheless,*" because they appeared to him to involve a condition which must be complied with before the right to petition accrued. It was in the nature of a condition precedent. A petitioner was to distribute his estate among his creditors, and if he could show that this petitioner had proceeded to distribute this estate himself, he was not entitled to the benefit of the Act of Parliament. The 4th section of the Act enacted, "that the commissioner so authorized shall proceed to examine upon oath the petitioner, and if it shall appear that the *allegations in the petition and the matters in the schedule are true,* it shall be lawful for the commissioner to appoint a day for the final order." In this case the allegation in the petition, that the petitioner had not parted with any of his property within three months of the date of filing his petition, was clearly untrue, and consequently the Court was not authorized to proceed to name a day for the final order. He would now refer to the 7 & 8 Vict. c. 96, which was passed to amend the Law of Insolvency contained in the prior statute to which he had alluded. The 2nd section of that Act provided "that every petition for protection from process shall be in the form specified in the schedule hereunto annexed, and such petition and schedule shall be verified by an affidavit, &c.; and if such petition and affidavit shall not be in the form herein prescribed, such petition shall be dismissed." That related to the form of the petition, and he would now turn to the schedule at the end of that Act of Parliament. The form of the petition was given. Amongst the allegations it contained was the following: "That your petitioner *has not parted with or charged any of his property* (except for the necessary support of himself and his family, and the necessary expenses, not exceeding £_____ of this his petition) or in the ordinary course of trade at any time *within three months of the date of filing this his petition*, or at any time with a view to this petition." Appended to that petition was an affidavit filed at the same time with the schedule, "that the several allegations in the petition, and the several matters contained in the schedule annexed, are true." Now if the petition and the affidavit be untrue, although the form had not been varied and it was in the form authorized, the Court was bound to dismiss it, because the petitioner did not come within the conditions precedent in the first Act "so as nevertheless that his estate may be duly distributed."

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The CHIEF COMMISSIONER inquired whether there was any distinct evidence as to the property that had been parted with. The proof was, that a man gave up his lease to his landlord. That would raise the preliminary question, whether he had parted with property. He made over his public-house to his landlord. The matter was adjusted by the petitioner giving up his house and the landlord foregoing the rent.

Creswell said that the question strictly was "whether the petitioner had parted with, or charged, any of his property within the three months." The schedule was evidence of that. This petitioner had parted with or charged his estate, so that he did not come within the condition that gave the Court jurisdiction. If a petitioner has broken the condition, he could not claim the benefit of the Act. Not only had the house and lease been parted with, but the stock in trade had been given up to the landlord. The creditors were damnified to that extent. The creditors would have a right to prove for the value of that property. Upon the face of the schedule he had parted with or charged his property within the three months, although he swore, at the foot of the petition, that he had not done so, which was an untrue allegation. He submitted that this petitioner did not bring himself within the condition which entitled him to the benefit of this Act of Parliament. The Court therefore had no jurisdiction. He referred to Pater-
son's Insolvent Practice, p. 10, and read "Errors in Petition.—The Court has no power to permit an amendment of any error in the petition: see 2nd section 7 & 8 Vict. c. 96, and *Re Adams*, 4 L. T. 378." And, lastly, he would refer to the case mentioned by his learned friend Mr. Macrae on a former day, *Re Henry John Mewburn*, 10 L. T. 69, which was the first decision in this Court bearing upon the point. He submitted that, upon this decision, and the circumstances of this case, the Court had no jurisdiction, and must dismiss the petition.

Dowse contended that the Court was not in this case compelled to dismiss the petition, because the allegation as to property was not in strict conformity with the fact. The Court was aware that the form was imperative, and that the only part the insolvent was to touch was the blanks. His learned friend argued that if a petitioner parted with any of his property during the three months preceding the date of his petition, it must be dismissed; but that would compel the Court to inflict an injustice on creditors by depriving them of property. If there were no other clauses in the Act than those referred to by his learned friend, there might be some force in his objections, but there were other clauses to which, if he referred, he would find that the Court might exercise discretion in sustaining this petition, otherwise they must suppose that the Act made no provision for meeting such cases as this. His learned friend must be satisfied that the Legislature never intended that this man should come here. He contended that he had parted with his property, and that must be punished by dismissing his petition. But the Legislature had, in its wisdom, im-

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ported a clause which was to set aside any transactions of this description which took place within three months of the date of presenting the petition and give to assignees power to recover. As to the 2nd clause of the Act, to which his learned friend had referred, if it was to be construed strictly, this man must remain without that property three months, to give him a title to apply. But the Act said that, if property has been assigned or charged, it shall be void as against an assignee. If property might, under no circumstances, be assigned or charged within three months, the clause which contemplated such an act was entirely useless; and an assignee could not be appointed unless the petition was sustained.

The CHIEF COMMISSIONER observed that, if he understood the drift of the argument, it was this:—The petitioner has parted with his property within the three months, it is true; but, because there is another section in the Act of Parliament which says that it shall not be valid, therefore the allegation in the petition need not be true. If such a making away with property be void, that did not make the allegation in the petition true or untrue.

Dowse contended that this Court had not the power to dismiss the petition unless it departed from the form given in the Act.

The CHIEF COMMISSIONER said he certainly did not intend to go so far as to affirm that, let the petition be correct in form, no matter how false in fact, it must be sustained. If a petitioner's circumstances turned out to be entirely different from what he had represented them to be in his petition, would he not necessarily lose his *locus standi* in that Court?

Dowse said, that he took the Act of Parliament and placed the best construction upon it which, in his humble judgment, he was able. If the petition and affidavit varied from the form, then the Court might dismiss the petition.

The CHIEF COMMISSIONER.—But it seems, you mean to contend that, if the form be correct, the man shall have a *locus standi*, although the allegations be false.

Dowse referred to the 4th section of the 5 & 6 Vict. c. 116, which enacted, that where it shall appear to the commissioner that the allegations in the petition and the matters in the schedule are true, and the debts of the petitioner were not contracted by any manner of fraud, &c. it shall then be lawful for the said commissioner to name a day: but if these were not true, then it followed that it should not be lawful for the commissioner to name any day.

The CHIEF COMMISSIONER observed that, upon the learned counsel's own argument in such case he could not grant a final order.

Dowse said, that was rather forestalling his conclusions. He would direct attention to the 19th section of the 7 & 8 Vict. c. 96. It says, adopting the form of words used in the other Act of Parliament, 1 & 2 Vict. c. 110, that an assignee shall have power to recover property parted with within three months of the date of

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the petition. That clause was introduced into this Act, although it was contended that the parties to whom it applied were not to have the benefit of the Act. Now, suppose an insolvent had been entrapped into an assignment of his property, it might be that he could not take the benefit of the 1 & 2 Vict. c. 110, and therefore the only form of petition which he could adopt was the form in the protection statutes, and because that form must be used, he must remain three months in prison, so as to give a title to those parties who had induced or deceived the insolvent to assign his property to them. To place a construction upon the Act which might have that effect, would often result in deep injury to the creditors, and serious detriment to petitioners. But give the petitioner a *locus standi* in Court, and an assignee would have full power to recover back the property. He would now turn to the facts. The insolvent took a lease, and there was a provision in it that if he did not pay his rent within three days after it was demanded it should be forfeited. The insolvent allowed the rent to fall several weeks into arrear, and then he permitted his landlord to take his own—that for which he could at any time have put in a distress. If the insolvent had refused, the landlord would have taken it without his leave.

The CHIEF COMMISSIONER said, that if the landlord had chosen to assert his power under a particular Act of Parliament he might do so, but that had nothing to do with the requisitions of the Act now under consideration, which required a petitioner to make a true statement to entitle him to the benefit it conferred; and could any man say that, although it might be correct in form, yet it might be filled with falsehood? That appeared to him a monstrous proposition, and one which he thought the Legislature never could have contemplated. He had very great doubts whether it was intended that this description of persons should be applicants under these very indulgent statutes. Another question of great importance was, did the Legislature contemplate that a man might come there *mero motu*, not compelled by any urgent strain, or arrest? When he had something to give his creditors, or, to use the words of the petition "has become indebted to divers creditors, and is unable to pay his debts in full," then, indeed, it was clear he might have a *locus standi*; but when he was unable to pay at all, the case was different. Nine-tenths of those who applied under these statutes were in this condition, and whether the Legislature had these persons in view he very much doubted. He knew that one learned commissioner in bankruptcy in London, and two in the country, entertained very strong opinions upon this subject, and said that a man *mero motu* had no right to be included in the class of persons for whose benefit these statutes were intended. He was prepared to hear the argument upon this point when it should arise. In the case now under consideration, the broad question was, can an insolvent's petition be sustained, if not accurate in form? The answer was, certainly not. The other question was, though the petition be correct in point

of form, yet, if any number of the statements it contains be false, can the petition be sustained? In his humble judgment, except for one argument, namely, that under the 19th section the creditors would lose all the property, it could not. However, he would take time to consider the point.

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COLLIER.*

February 17, 1848.

The COURT this day delivered judgment.

The CHIEF COMMISSIONER said, that the insolvent applied for the protection of this Court under the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96, and he has filed his petition and schedule, which has been duly attested by affidavit. But at his first examination an objection was taken by Mr. Creswell, on behalf of an opposing creditor, that notwithstanding he has filed a petition and schedule conformably to the practice under these Acts, and that they had been duly attested by affidavit, yet, inasmuch as the statements therein are untrue, the petition must be dismissed. Mr. Dowse, for the insolvent, on the other hand, contended that the Court must sustain the petition, and, notwithstanding that there was a mistake in it as to facts, still the Court had a thorough cognizance of the case. Now, under the first-mentioned Act, the 5 & 6 Vict. c. 116, it was enacted, that if it shall appear to the commissioner, upon the examination of the insolvent, that all the allegations in his petition, and all the matters in the schedule, are true, and that the party has not contracted any other offence specified in the Act of Parliament, then it shall be lawful for him to name a day for the final order. That was the provision under the 5 & 6 Vict. c. 116. Now one of the allegations in this insolvent's petition was untrue, and the 4th clause of that Act expressly enacted, that if it shall appear to the commissioner that the allegations are untrue, then he shall have power to name no day for the final order. There are no forms in that Act at all; but about a year after came another Act of Parliament, which enacted that a petitioner shall file a petition in a certain form therein prescribed, and if any such petition and affidavit shall be in any other form, it shall be dismissed. It is contended for the insolvent, that if the petition be in this form, no matter whether the statements it contains be true or false, still such petition may be sustained. Now it does seem a very startling proposition, that justice shall be satisfied by a mere form. The Legislature seems to say that this matter must be performed in a certain way. The form is the same as in the first Act. The words are that he shall swear "that the several allegations in the said petition, and the several matters contained in the schedule hereunto annexed, are true." This is the identical form in the first Act. Now it seems to me that these two courses are open to the Court; to deal with it in two ways—to dismiss the petition, which is our undoubted right, or to apply the 4th section of the 5 & 6 Vict. c. 116. The Act which says such petition shall be dismissed, does not confine the Court to say you shall not

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dismiss in any other case, but rather it went the other way; for if it provided that in this particular instance you shall have no discretion, but shall dismiss, then in the other case a discretion might be exercised. There was no doubt but that the Court had power to dismiss the petition, although it was quite in the form prescribed, otherwise it would lead to these consequences, that it was perfectly immaterial whether the oath was true or false,—a proposition which could not come into the mind of any Legislature. It was expressly said in the 74th section of the 7 & 8 Vict. c. 96, that nothing in that Act shall be construed to repeal, affect, or in any manner alter the provisions of the former Act, the 5 & 6 Vict. c. 116, except as expressly provided, or except as the provisions of that Act were inconsistent or at variance with the provisions of the former Act. Save where the first Act of Parliament was expressly alleged to be altered, or where it was an obvious inference, its provisions remained in force. The second Act, so to speak, continued to keep an eye on the 4th section of the former Act, which begins by enacting, that if it shall appear to the Commissioner that all matters in the petition and schedule are true, then it shall be in the power of the Court to name a day for the final order. Is it not common sense, that if these conditions upon which a day is to be appointed for the final order be not observed, the Court has no power to name a day? They had a right, then, either to dismiss the petition or to refuse to make a final order. Now here the insolvent in his petition alleges he has not made away with any property not included in the exceptions at any time within three months from the date of filing his petition. Turn to his schedule and you will find that statement contradicted. I have said that the Court has power to deal with this case in two ways, either to dismiss the petition, which the Court has always the power to do, or to apply the 4th section. Mr. Dowse argued that the Court was bound to retain this petition, because, under the 19th section of the 7 & 8 Vict. c. 96, it was enacted, that if a party being in insolvent circumstances shall voluntarily convey, assign, or transfer any estate, real or personal, within three months of the date of filing his petition, or in contemplation of his becoming insolvent, it shall be void as against the assignees. Now in this case all the different circumstances enumerated in that section concurred, and counsel did not wish the petition to be dismissed. What, then, was to be done? He was of opinion that it was not lawful for him to name a day, and he should appoint no day for the final order.

Dowse.—Within what time may the insolvent apply for his protecting order under the 28th section?

The CHIEF COMMISSIONER.—Under the 28th section he may apply that it may be granted at any time.

Dowse.—Perhaps I may be excused for referring to what takes place in another Court in this building. When Commissioner Law names no day for the final order, he almost always names a period upon the expiration of which the party may apply under the 28th section.

The CHIEF COMMISSIONER.—Contemporaneously with refusing to name a day?

Re J. W. COLLIER.

Cooke (amicus curiae).—Commissioner Law does not name a period; but what he sometimes says in these cases is said negatively, as for instance, you need not apply within four months.

The CHIEF COMMISSIONER.—The 28th section seems to contemplate what an insolvent has been doing since. The Commissioner shall have power after the expiration of such time as, having regard to all the circumstances, and the conduct of the petitioner before and after his insolvency, he shall think just, to make an order to protect the petitioner. I don't think this is the time to fix a day. I may do it afterwards.

No day was named.

INSOLVENT DEBTORS' COURT.

March 7, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Re Moses HART.

Bail—Practice—Opposition by Attorney.

The Court allows attorneys to oppose for creditors in matters of bail.

THIS insolvent applied to be admitted to bail, on tendering *Re M. HART.* sureties for his appearance on the day appointed for his hearing.

Langley, attorney, appeared to oppose the bail, on behalf of a creditor.

After examination by Langley, the Court granted the application.

Bail allowed.

See note in Cooke's Insolvent Practice, p. 158. Counsel uniformly are in attendance in the Court, yet notwithstanding this the Commissioners of the Court have thought it expedient, for some cause not assigned, to allow attorneys, and even attorneys' clerks, to oppose sureties.

INSOLVENT DEBTORS' COURT.

March 6, 1848.

(Before MR. COMMISSIONER PHILLIPS.)

*Protection case.**Re FOSTER.**Vexatious Defence to an Action.**A petitioner under the Protection Statutes having defended an action vexatiously will have no day named for his final order.**Re FOSTER.*

THIS insolvent appeared for his interim order. *T. Hughes* opposed for a creditor, upon the ground that the insolvent had vexatiously defended an action at the suit of his client, upon a bill of exchange, which he had accepted, and to which he pleaded, denying his acceptance, and that he was never indebted. The record and other evidence in support of the opposition having been tendered,

Cooke, for the insolvent, would not justify him in pleading to the action, unless he had good grounds for doing so. The insolvent was advised that, as the debt for which he was sued was under 20*l.* he ought to have been sued in the County Court, instead of in the Court of Common Pleas. The plaintiff was acting clearly in opposition to the spirit of the Legislature, and if the insolvent was animated by a *bonâ fide* feeling that the plaintiff had taken an improper course in law, he was justified in defending the action, no matter by what degree of vexation it was accompanied.

MR. COMMISSIONER PHILLIPS said that there could not be a better index to a man's acts than his intentions expressed by himself. The insolvent certainly had implored the plaintiff to settle the action, but, when the offer was declined, as the parties had an undoubted right to do if they thought proper, what was the insolvent's reply? Did he say, "if you don't abide by my terms I will defend the action to the utmost, because I believe I have a point of law in my favour?" If so he would have been justified; but what he really did say was, "If you don't accept my terms I will plead to the action; I will go through the Insolvent Debtors' Court, and you will never get a farthing; I don't care a pin about your opposition there for the vexatious defence." Under these circumstances he should name no day for the final order.

Note.—Independently of the point decided in this Court the case of *Moore v. Foster* is of interest, as being the first in which the point arose as to whether it is competent for parties to sue in the Superior Courts for debts under 20*l.* now that the County Courts are in operation.

INSOLVENT DEBTORS' COURT.

(Before MR. COMMISSIONER HARRIS.)

*Re Isaac Stacy.**Vexatious Defence.**An opposition for vexatiously defending an action fails if the verdict is for a sum less than that claimed by the plaintiff in his particulars of demand.*

THIS insolvent appeared for his interim order.

Re I. STACY.

Mr. Sandford opposed for the detaining creditors, who were assignees of Messrs. Evill and Douglas. The ground of opposition was the vexatious defence of an action. The record in the action was put in, and the vexatious defence proved, but the particulars of demand being for 25*l.* and the verdict for 20*l. 0s. 9d.* only,

The COURT intimated that the opposition had failed.

The insolvent was remanded upon another ground of opposition.

INSOLVENT DEBTORS' COURT.

March 2, 1844.

(Before MR. COMMISSIONER HARRIS.)

*Re Lucy Johnson.**Bail.**A sheriff's officer will not be accepted as a surety for an insolvent's appearance at his hearing.*

IN this case the insolvent, a prisoner in the Borough Gaol of Liverpool, applied to be released on bail. One of the proposed bail was a sheriff's officer; in his affidavit no allusion was made as to his being surety to the sheriff for the execution of his office, or to what amount he was surety.

Re L. Johnson.

MR. COMMISSIONER HARRIS expressed a doubt whether a sheriff's officer, under any circumstances, could be admitted to become a surety.

Mr. Dows (amicus curiae) cited a case, *Re Lawrence*, confined in Petworth Gaol, which came before the Court on the 23rd December last, where one of the proposed bail was a sheriff's officer, and Commissioner Pollock, after considering the point, refused to admit him as bail.

MR. COMMISSIONER HARRIS considered the case decisive, and rejected the bail.

Bail rejected.

INSOLVENT DEBTORS' COURT.

Newcastle, February 28, 1844.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Re HENRY INGS.

Intermission of Imprisonment between the Petition and the Hearing.

No prisoner petitioning in the Court for Relief of Insolvent Debtors is entitled to the benefit of the Act, unless at the time of filing his petition, and during all the proceedings thereon, he shall be in actual custody within the walls of a prison, without any intermission of such imprisonment by leave of any other Court, or otherwise.

*A prisoner attending upon a *habeas corpus ad testificandum* to give evidence in a cause in another Court, after which he forthwith returns to the gaol, is not precluded thereby from taking the benefit of the Act of Parliament.*

Re H. INGS. THE hearing of this insolvent in November, 1843, before Mr. Commissioner Law, was adjourned to file an amended special balance-sheet. Upon filing such special balance-sheet, the Commissioner adjudged that the insolvent should not be discharged on recognizances. In the month of December, the insolvent was taken up to London upon a *habeas corpus ad testificandum*, to give evidence in a certain cause, to be tried in the Court of Exchequer. He was in London three or four days; and then returned to the Gaol at Newcastle, in the custody of the gaoler.

Upon the insolvent being brought up this day,

Dowse, for the opposing creditors, submitted, that the insolvent's petition should be dismissed, the insolvent not having remained within the walls of the prison, pursuant to the provisions of the 38th section of 1 & 2 Vict. c. 110, which enacts, "that no prisoner shall, upon his own petition, be entitled to the benefit of this Act, who shall not be, at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment by leave of any Court or otherwise;" the *habeas* issues upon an affidavit that the insolvent is a material witness, and is *willing* to attend to give evidence. In this case it did not appear that any application had been made to the insolvent to learn the nature of his evidence, or that he was *willing* to attend; the whole proceeding must therefore be considered collusive, and the petition must be dismissed.

Sandford, on behalf of the insolvent, was ready to answer the objection; but

The CHIEF COMMISSIONER decided that the insolvent should be heard upon his petition, giving liberty to the opposing creditors to move for a re-hearing, in case it should be considered that his decision was incorrect.

INSOLVENT DEBTORS' COURT.

March 12, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re HENRY HIGGS.**Bail—Discharge from Custody.**An insolvent cannot be heard unless in actual custody on the day appointed for his hearing.*

THIS insolvent, who had been out on bail, appeared for his ^{Re Jas.} _{J. J. SYER.} hearing, but it being stated that his discharge had been lodged at the prison on the previous evening, and that there was no other detainer against him,

The CHIEF COMMISSIONER said he could not entertain the case if the insolvent was not in actual custody.

Dowse (amicus curiae), said that in the case of *Re Benjamin Round*, who was out on bail, and whose hearing was appointed for the 19th December, 1840, but whose detaining creditor sent a discharge to the prison on the evening of the 17th, the Court, consisting of Commissioners Bowen and Law, decided that it could not hear him as he was not in actual custody. In the case of *William Wightman*, also, in 1840, the Court decided the same way.

The COURT declined to entertain the case, which was struck out.

INSOLVENT DEBTORS' COURT.

September 29, 1847.

(Before MR. COMMISSIONER PHILLIPS.)

*Re JAS. J. J. SYER.**Practice.**An insolvent having been sworn, the Court will not permit his case to be re-opened by an opposing creditor.*

INSOLVENT had been sworn to the truth of his schedule, and ^{Re} _{H. Higgs.} had executed the warrant of attorney as required by the Court, previously to the adjudication being pronounced, when

Re
H. HIGGS.

Simon, who appeared for a creditor, wished to put some questions to the insolvent respecting property, but

Cooke, for the insolvent, objected to an examination, as the case was over.

The COURT sustained the objection.

The insolvent was discharged.

INSOLVENT DEBTORS' COURT.

March 2, 1844.

(Before MR. COMMISSIONER POLLOCK.)

Re LOUIS AUGUSTE DIEUDONNE.

Insolvent Foreigner—Opposing Creditor Foreigner.

A foreigner taking the benefit of the Act may be opposed by his foreign creditors, and, upon a case being established against him of making away with property, notwithstanding that it was acquired in a foreign country, this Court will order him to be remanded.

*Re L. A.
DIEUDONNE.*

THIS insolvent came up for hearing on the 19th February, on which day his case was adjourned, for him to produce satisfactory evidence of several alleged payments entered in his special balance-sheet, and to account for certain losses alleged to have been sustained by him. On this day (as on the former) his discharge was opposed by *Cresswell*, on behalf of a M. Jaquinot, and other creditors residing in France.

The insolvent had been a miller, corn-dealer, government contractor, and general merchant, carrying on business at Nevers, in France, from which place, in the month of June, 1842, he absconded to England, having the sum of 3,600*l.* in cash in his possession, leaving behind him debts due to his creditors in France, amounting to no less than 19,000*l.*

It was admitted that, after his absconding from France, proceedings were taken against him *par contumace*, under which he had been declared a fraudulent bankrupt, sentenced to twenty years' hard labour at the galleys, to be exposed on the pillory, and to pay the costs.

Some time after his arrival in England he was followed by some of his creditors, who made an affidavit of their respective debts due

to them by the insolvent, as also an affidavit of their belief of his intention to leave this country, whereupon he was arrested on a Judge's order.

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DIEUDONNE.*

Upon his examination by *Cresswell* for the opposing creditors, it appeared that, immediately on his coming to England, he had commenced trading with the 3,600*l.*, and also carried on the business of a bill discounter and money lender, and (without going into the various details set forth in his special balance-sheet) it appeared that, on his being arrested, the whole of the 3,600*l.* was gone, excepting a sum of 800*l.* lent by him on a promissory note for 1,000*l.* not yet due, which note the insolvent had filed with his books and papers in this Court. It was, therefore, for the making away with this money that his discharge was opposed.

Cresswell contended, that although this Court could have nothing to do with the mode by which the insolvent had contracted his debts in France, or with any of the proceedings in the Courts of judicature in France, as far as the bankruptcy was concerned, it had jurisdiction to hear and determine as to the right of the French creditors to oppose the insolvent's discharge, as also to decide as to the disposition of the money brought by the insolvent from France, which clearly ought to have belonged to his French creditors. The insolvent was endeavouring to avail himself of the benefit of an English Act of Parliament to be discharged in England from the debts contracted by him in France, for which he was in custody in England at the suit of his French creditors; that therefore there ought to be a reciprocity, and that the French creditors ought to be allowed the same right that an English creditor would have of inquiring into the disposition of an insolvent's property, and claiming a remand at the hands of the Court, if it could be made apparent that there had been a fraudulent making away of such property. In this instance, he contended, that such a case had been made out, and that particularly with regard to the 800*l.* the insolvent was not justified in lending so large a sum of money, which was the property of, and clearly ought never to have been taken from, his creditors. He therefore prayed a remand.

Cooke (with whom was *Woodruffe*), on behalf of the insolvent, said that no person was now more fully aware than the insolvent of the unfair, injudicious, and ill-advised step he had taken in coming to this country. With respect to the sentence of twenty years to the galleys, which had been passed on him *par contumace*, that must not be supposed to be the result of his misfortune in trade, but as the punishment for his absconding from his creditors. Still he contended that this Court had nothing to do with what had occurred in France. The insolvent had not contracted a single trade debt in England; and he did not see how this Court could or ought to take cognizance of the bringing away the money from France. The insolvent was in custody of two French creditors, who invoked the power of this Court to punish a crime committed in France. He had offended against the law of France, and not against the law of England. The only question for this Court was

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DIBUDONNE.*

the disposition of the 3,600*l.* The insolvent had been tempted to lend 800*l.* under the promise of getting 1,000*l.* in eighteen months, but had not been guilty of any fraud in doing so. He therefore submitted that his discharge should not be retarded by any adverse judgment.

MR. COMMISSIONER POLLOCK.—This is a case of no inconsiderable importance. It is true I have nothing to do with the transactions in France, as far as the bankruptcy is concerned; but it is quite clear in my judgment that I am bound to look at this person as an insolvent debtor seeking to avail himself of this Act of Parliament, opposed by persons who have all the right here to do so; and I hope the law will never be altered in this respect. The insolvent had no right to come to England and start new schemes for his future support at the expense of his French creditors. So little right had he to do so, that I am of opinion that the creditors are quite justified in following him, and reclaiming the property which he has carried from them, and complaining here of the way in which he has disposed of that large sum of money. I am of opinion that this case is within the meaning of that clause of the Act of Parliament which invests the Court with power to punish for a making away with property, and that the creditors have a right to complain of the insolvent on that ground. I shall not overlook the overtures which the insolvent has made to his creditors since his arrival in this country, but they were not effectual; neither can it be permitted that a man should hold his creditors at arm's length, and dictate his own terms to them. The insolvent, in the month of May, 1843, trusts 800*l.* to a person who is likely to turn out insolvent himself (and who has since been in prison) on a speculation that he (insolvent) shall receive in eighteen months 1,000*l.* for the 800*l.* so advanced. That is a distribution of the money so incompatible with a desire of doing justice to his creditors, that it is impossible to say it was done for their benefit; in point of fact, if the insolvent was sincere in his wish to settle with his creditors, the lending of that money was at the least a postponement for eighteen months of his ability to settle his affairs. It was quite clear that the transaction was not just under the law relating to interest on money. With respect to the money said to be lent by the insolvent to M. Hostot, nothing was known of him, save that he is now in the prison of St. Pelagie for five years, which shows the character of the man said to be respectable. Under all the circumstances of the case I feel called upon to adjudge the insolvent entitled to the benefit of the Act and to his discharge, when he shall have been in custody for a period not exceeding twelve calendar months from the date of his vesting order, for making away with his property with intent to diminish the sum to be divided among his creditors.

INSOLVENT DEBTORS' COURT.

January 27, 1844.(Before the CHIEF COMMISSIONER REYNOLDS, and COMMISSIONERS
HARRIS and POLLOCK.)*Re EDWARD WRIGHT.**Division of future acquired property, after several insolvencies.**Property acquired by an insolvent after passing through the Court three different times is to be divided equally (in proportion to the amount of the debts due) amongst all the creditors in the several schedules.*THE argument in this case having been heard by the full Court, *Re*
E. WRIGHT.
it was adjourned for consideration. To-day,

MR. COMMISSIONER POLLOCK delivered the judgment of the Court.—The insolvent in this case has been discharged three times under the several Insolvent Acts; first, on the 18th of June, 1823; secondly, on the 23rd of March, 1827; and lastly, on the 1st of December, 1836. No sub-assignee has been appointed in either of the two first discharges; but James Appleton was appointed under the last discharge, and received his appointment on the 4th of July following. The affidavits disclose that John Nicholson, the father of the insolvent's wife, Sarah Wright, died in or about the year 1841, leaving a will bearing date on or about the 18th of July, 1825, but appointing no executors. The said Sarah Wright and Robert Nicholson, one of her two brothers, have obtained letters of administration bearing date on or about the 24th of February last, to the estate of the said John Nicholson, with the will annexed, and it appears that he has left considerable personal property, the sum sworn to on obtaining such letters of administration being under 9,000*l.* The administratrix and administrator disposed of the stock in trade and household effects of the said John Nicholson, and have taken steps to dispose of some leasehold premises in Cornhill, belonging to the estate, and employed Mr. Hoggart as the auctioneer in one instance, and Mr. Henry Bingham in another, in doing which Mr. Henry Hoppe was employed as their attorney. On the 5th of July last the assignee obtained a rule by counsel, which, after having been amended by order of the Court, was ordered, that the said Sarah Wright and Robert Nicholson, as such administratrix and administrator, and also the said Henry Bingham, Mr. Hoggart, and Henry Hoppe, to hold and retain the moneys to which the insolvent had become entitled in right of his wife, under the said will, and also to show cause why such moneys, or such part thereof as the Court might think fit, should not be paid over to the said assignee for the general

Re
E. WRIGHT.

benefit of the creditors entitled to claim under the judgment entered up by order of the Court in pursuance of the provisions of the Insolvent Act. By a rule of this Court of the 31st of July, it was ordered that the said Sarah Wright and Robert Nicholson, Henry Bingham, Mr. Hoggart, and Henry Hoppe, should pay over to the said assignee, for the purpose aforesaid, the sum of 730*l.* of the moneys to which the insolvent had become entitled in right of his wife under the said will. It having been discovered that one Thomas Cox Savory had become the purchaser at the auction of certain premises in Cornhill belonging to the deceased, but that he had not completed the purchase, the assignee, on the 6th of November last, obtained a rule of this Court, by which the said Thomas Cox Savory was ordered, on completing his purchase, to retain thereout the sum of 730*l.* until the further order of the Court, and that the said Thomas Cox Savory, and the said Sarah Wright and John Nicholson, as administratrix and administrator as aforesaid, should, on the 18th day of November last, show cause why the sum of 730*l.* should not be paid over to the assignee of the said insolvent for the general benefit of the creditors, in fulfilment of the said rule of the 31st of July. On the 18th of November the said Thomas Cox Savory did not appear to show cause, and in reality no sufficient cause was shown against the said rule; it appearing, that since the decease of the said John Nicholson, the said insolvent and his wife have executed a deed or agreement in favour of one Thomas Lund and one William Frederick Schneider, by which all the interest of the said insolvent in right of his wife under the said will was conveyed or assigned to the said Thomas Lund and William Frederick Schneider, upon trusts for the benefit of the said insolvent and his wife; which said deed or agreement was brought forward to show that the said insolvent had no such interest in right of his wife, under the said will now subsisting in him; but that the same was now wholly vested in the said Thomas Lund and William Frederick Schneider. The motion in this case has been limited to the payment over to the assignees of the sum of 730*l.*, although the property of the deceased (as sworn to for the administration duty) may be presumed to exceed 8,000*l.*, of which the insolvent, in right of his wife, is entitled to one-third. This evidently has arisen from the circumstance, that the aggregate amount of the debts in the schedule in which James Appleton is the assignee, is 726*l.* 5*s.* 6*d.*, and he was at the hearing awarded by the Court his costs of opposition, which amount the sum of 730*l.* might be supposed to cover. The amount of debts in the schedule of 1823 is 2,680*l.* 6*s.* 8*d.* and credits to the amount of 375*l.* 2*s.* 6*d.* as good, and now barred by the Statute of Limitations. The debts in the schedule of 1827 are 894*l.* 16*s.*, and the credits 3*l.* 6*s.* 6*d.*, also barred by the statute. Upon the principle laid down in the case of James Charles Johns, any sum ordered by the Court to be paid over for the benefit of the creditors would be divisible in proportion among all the creditors in the three schedules. The rule, therefore, will be

absolute on Mr. Thomas Cox Savory to pay over the sum of 730*l.* of his purchase-money into Court, to abide the order of the Court as to its disposition for the benefit of the creditors in the three schedules, which order will be made upon notice to the Court of its having been brought in.

Rule absolute.

Re
E. WRIGHT.

INSOLVENT DEBTORS' COURT.

March 20, 1844.

(Before MR. COMMISSIONER HARRIS.)

Re WILLIAM LONERGAN.

Proof of Debt—Foreign Bills of Exchange filled up in England.

*A bill of exchange for 700*l.* purporting to bear the drawer's name in Hamburg (although there was no evidence to that effect), filled up and accepted in London, will not be received in proof of a creditor's debt.*

MONTAGUE CHAMBERS appeared to oppose this insolvent for the indorsee of two bills of exchange.

Re W.
LONERGAN.

Cooke, for the insolvent, called upon the opposing creditor to prove his debt.

The two bills of exchange were then put in evidence.

Cooke objected that, although the bills purported to bear date in Hamburg, they were drawn in England and unstamped. An action could not be sustained upon them against the drawer: (*Jordaine v. Lashbrooke*, 7 Term Rep. 601.)

Bennet, clerk to the insolvent, proved that the bills were brought to him by a clerk of Howard, Grand, and Co., Old Jewry Chambers. They bore the drawer's name, P. Allein, Hamburg, and he wrote the date 19th September, 1843, and the amount. They now bore his master's name as acceptor, but they did not, when he filled up the bills. They had no stamp affixed.

Cooke contended that the date, the amount, and the acceptance constituted the bills, all which being filled up in England upon unstamped paper, they could not be received as proof of a debt.

Montague Chambers, contra, cited *Snaith v. Mingay* (1 Maule & Sel. p. 87), and *Bailey on Bills*.

MR. COMMISSIONER HARRIS said that he had looked into the cases, and was of opinion that the Irish case (*Snaith v. Mingay*), did not overrule *Jordaine v. Lashbrooke*. If it did it would have been stated by the Court. If they thought that they had any ground, they might move the full Court for a re-hearing, but he was quite satisfied.

The opposition was disallowed and insolvent discharged.

INSOLVENT DEBTORS' COURT.

*February 26, 1847.**Re HENRY ANDREWS.**Infant's Petition.**The petition of a minor cannot be entertained by the Court.**Re HENRY
ANDREWS.*

THIS insolvent petitioned the Court in the month of October, 1845, and his hearing was appointed for the 8th of November following, at Lancaster, when *Monk* opposed for several creditors, and it appearing that the petitioner would not be of age till July, 1846, the case was adjourned by Mr. Commissioner Pollock to the next circuit, and from that circuit again to the next, admitting the insolvent to bail in the interval. On the 11th of November, 1846, the insolvent appeared, but the gaoler reported that he received his discharge on the 4th instant. On the 21st of January, 1847, a rule was obtained by *Cooke* for the insolvent, upon the creditors, "to show cause why the petition should not be dismissed, he having been discharged out of custody without taking the benefit of the Act." On the 5th of February following, *Nichols*, for the creditors, showed cause, after which the Court took time to consider. To-day, the judgment of the Court was pronounced by

The CHIEF COMMISSIONER.—This insolvent came up on his own petition before Mr. Commissioner Pollock at Lancaster, on the 8th of November, 1845, and notice of opposition being given he was opposed by counsel, when it appearing that the insolvent was a minor and consequently could not be heard, it was adjourned to the next circuit, he being admitted to bail in the interval. The following circuit came, and the insolvent did not make his appearance, he having gone out of custody and satisfied his debts. He now wishes his petition dismissed, but going out of custody was no reason for dismissing a petition, and in that his learned brothers, Commissioners Law and Phillips, agreed with him. There could be no doubt in any person's mind that the Act must be applied according to its provisions. There was no doubt when he first came up, that the insolvent could not execute a warrant of attorney, and if, upon that ground, Mr. Commissioner Pollock adjourned the case to the next circuit, those adjournments might be ordered at any period. He doubted the authority of Mr. Commissioner Pollock to adjourn the case from circuit to circuit. They (Commissioners Law and Phillips) thought that this person had no *locus*

standi in that Court, because he could not execute the various duties and acts required by the statute. The rule would therefore be made absolute for dismissing the petition.

Re HENRY ANDREWS.

Cooke observed that the original proceeding was invalid.

Rule absolute for dismissing the petition.

Note.—The effect of this judgment is, that no minor's petition can be entertained for the future.

INSOLVENT DEBTORS' COURT.

May 17, 1847.

(Before the CHIEF COMMISSIONER REYNOLDS, and
MR. COMMISSIONER PHILLIPS.)

Re DANIEL NIGHTINGALE.

Opposition—Preference.

An opposition to the discharge of a prisoner upon the ground that he has given an undue preference to a creditor will fail, unless it be shown that it affected the creditors generally, by diminishing the sum to be divided amongst them.

THIS insolvent was opposed for vexatiously defending an action, *Re DANIEL NIGHTINGALE.* and for having given undue facilities amounting to a preference to one of his creditors to possess himself of his property. The evidence being concluded,

The COURT said, that it was certainly true that an effort had been made by one creditor to obtain an execution, in order to defeat another creditor who was attempting the same thing, but that was no offence under the Act of Parliament. The offence intended by the statute was, any act done to the detriment of the general body of creditors. There was in this case a race between two creditors who should first possess themselves of the insolvent's property, and the act of the insolvent was merely a facility given to one creditor to defeat the other. The insolvent would be remanded for three months for having vexatiously defended the action, but no case of having given an undue preference to the injury of all his creditors had been substantiated.

INSOLVENT DEBTORS' COURT.

January 14, 1840.

(Before the CHIEF COMMISSIONER REYNOLDS and
MR. COMMISSIONER BOWEN.)

Re GEORGE HENRY FRANCES.

Opposition—Preference.

A creditor who has sought a preference for himself, will not be allowed to oppose.

Re G. H.
FRANCES.

THIS insolvent was opposed by W. H. Shuffry, a creditor, in person.

Woodruffe, for the insolvent, took an objection *in limine* to his opposition, upon the ground that he had sought a preference for himself. The learned counsel put in two letters addressed by this creditor to the insolvent while in prison, in answer to a communication to him by the insolvent, requesting him to become bail and promising that if he would do so, he would give him a security for his debt. The letters were read and they expressed the willingness of the creditor to become bail, and do what was necessary if the security were given to him. The security, however, was not given, and he refused to become bail. But sureties were obtained, and he now submitted that this opposition should be disallowed upon the ground that the creditor had sought an undue preference.

The COURT said that it was in accordance with the ordinary practice to prevent creditors opposing who should seek by any means a preference to themselves.

The Creditor observed that he did not originate the negotiation, but merely replied to the insolvent's application.

The COURT declined to recognize the distinction, and the opposition was not allowed.

INSOLVENT DEBTORS' COURT.

January 10, 1848.

(Before MR. COMMISSIONER HARRIS.)

*Protection Case.**Re WILLIAM BRENNING.*

Practice—Application for a discharge under the 6th and 7th sects. of the 7 & 8 Vict. c. 96—Opposition.

A prisoner for debt applies for leave to come up for a hearing under the 7 & 8 Vict. c. 96; but it appearing that he had fraudulently assigned property to his brother-in-law, the application is refused.

Query, as no assignee is, or can be, appointed, and the petition remains on the files of the Court, how is the property fraudulently assigned to be reached by the creditors?

A rule nisi will be granted upon the insolvent to show cause why his petition should not be taken off the files of the Court, upon which, no cause being shown, the petition will be dismissed. The creditor will then be at liberty to file a creditor's petition, under the 1 & 2 Vict. c. 110.

THIS insolvent had applied for a rule on his detaining creditor, to show cause why he should not be allowed to come up for his interim order, and a discharge from prison to issue thereon. To-day

*Re W.
BRENNING.*

Douse, for Mr. Stafford, the detaining creditor, showed cause. He opposed the application upon the ground that the allegation in the insolvent's petition, that he had not parted with any of his property (except in the ordinary course of trade) within three months of the date of filing his petition, was untrue. The insolvent had assigned over the lease of his house in Welbeck-street, together with some valuable furniture and fixtures, which in 1846 cost him 500*l.*, to his brother-in-law for 250*l.*, upon the 1st of December last, which was within one month of filing his petition on the 31st of December. That was neither for the necessary support of himself and family, nor in the ordinary course of his business. He submitted, therefore, that the allegation in the petition was false, and that the insolvent's application must be refused.

The insolvent having been examined,

MR. COMMISSIONER HARRIS considered that the property had been fraudulently assigned by the insolvent to his brother-in-law, and he should therefore decline to make any order for his discharge from prison.

January 25.

Douse moved for a rule calling upon the insolvent to show cause why this petition should not be dismissed. He reminded the learned Commissioner of the facts of the case. The insolvent had disposed of the furniture and fixtures of his house in Welbeck-

*Re W.
BRENNING.*

street to his brother-in-law for 250*l.* and he had not disclosed some property and some railway shares which he had assigned to another party named Saunders. Upon these grounds the Court would not grant the insolvent leave to come up for an interim order. The creditors and the insolvent were now in this condition, that in consequence of having no day named for coming up, there was no possibility of appointing an assignee. No steps could therefore be taken by the creditors to obtain possession of the property assigned by the insolvent, and the insolvent could not proceed upon his petition. Perhaps the most advisable course to take was to have the petition dismissed. A rule might be granted upon the insolvent to show cause why his petition should not be dismissed, which, if done, would deprive the Court of further jurisdiction. The detaining creditor would then be at liberty to file a creditor's petition under the 1 & 2 Vict. c. 110, and by being appointed assignee, proceed to a sale of this property, which was more than sufficient to pay the creditors twenty shillings in the pound.

The COURT granted a

Rule nisi.

February 7.

Dowse appeared to make the rule absolute. It had been served upon the attorney and the insolvent.

No cause being shown, the Court made the *Rule absolute.*

August 8.

(Before MR. COMMISSIONER LAW.)

The detaining creditor afterwards presented a petition under the 1 & 2 Vict., and obtained a vesting order, but before any further steps were taken the insolvent agreed to pay the detaining creditor's debt and costs, but his attorney only tendering the amount of the judgment without the costs, it was refused; upon which he took out a summons before a judge for the discharge of the insolvent upon payment of the amount tendered. The judge adjourned the case for the production of an affidavit that the money tendered for the payment of the debt did not belong to the insolvent, which his solicitor stating that he could do, the amount tendered was taken, upon the understanding that the detaining creditor would not give up his claim for the costs. A rule was then obtained for annulling the vesting order, upon which

Dowse appeared to oppose the motion. He said the debt and costs were paid, but he wanted the costs of the proceeding under the 5 & 6 Vict. and 7 & 8 Vict. c. 96.

MR. COMMISSIONER LAW declined to allow the costs of the original proceeding, but directed the rule to be made absolute for annulling the vesting order, observing that the Act required the consent of the creditor, but he did not care for that; for if a man paid every debt he owed he had a right to have his petition dismissed.

Rule absolute.

INSOLVENT DEBTORS' COURT.

Wednesday, February 2, 1848.

(Before Mr. COMMISSIONER PHILLIPS.)

Re JAMES FRENCH.

Small Debts Act.

A final order is no protection against an order of commitment under the 8 & 9 Vict. c. 127, made before the filing of an insolvent's petition.

THIS insolvent obtained his final order. Upon leaving the court he was arrested by an officer holding a warrant of commitment to Maidstone Gaol for thirty days, under the 8 & 9 Vict. c. 127. At the insolvent's request, the officer consented to return with him to the court, to ascertain whether the capture was valid against the final order. The schedule and the order of commitment being inspected, it appeared that the warrant of commitment was dated the 31st of December, 1847, whereas the petition was not filed till the 8th of January, 1848.

*Re JAMES
FRENCH.
Small Debts
Act.*

*Order of com-
mitment.*

Mr. COMMISSIONER PHILLIPS referred to the 2nd section of the act, which enacts that "no protection, or interim, or other order issuing out of any Court of Bankruptcy, or for the Relief of Insolvent Debtors, nor any certificate obtained *after* such order for imprisonment under this act shall be available to any debtor imprisoned under such order as aforesaid." In this case the order for the insolvent's imprisonment was obtained before he filed his petition. He, therefore, had no authority to interfere.

The insolvent left the court in custody.

INSOLVENT DEBTORS' COURT.

Monday, February 14, 1848.

(Before Mr. COMMISSIONER PHILLIPS.)

Protection case.

Re ELIZABETH COYD.

Debts under former insolvencies — Trader — Amendments — Costs of adjournments.

The debts under a former insolvency not having been inserted in this insolvent's schedule,

Held, that the case may be adjourned to be amended by inserting the old debts, and that the costs so occasioned should be paid by the attorney.

*Held, that a coffee-house keeper is a trader, *eo nomine*, within the meaning of the bankrupt laws.*

Semblé, a man may be a trader independently of the amount of debt contracted with one or more persons while in trade.

Re ELIZABETH COYD. THIS insolvent appeared for her interim order; but the debts under a former insolvency in 1841, amounting to 241*l.* had been omitted from the schedule.

Mr. COMMISSIONER PHILLIPS communicated with Mr. Commissioner Law to ascertain his opinion as to whether the case might be adjourned for the insertion of these debts.

Upon receiving his written reply,

Mr. COMMISSIONER PHILLIPS said, Mr. Commissioner Law seemed to think that it might be adjourned to amend the schedule by the insertion of these debts as well as for the insertion of any other debts. He was very glad of that, as this was a case of insolvency arising entirely from the operation of causes which this poor woman could not avoid, and which took away her means of subsistence. The case would stand adjourned for the insertion of these debts, protection to be granted in the meantime. He was quite of opinion that the insolvent's attorney should pay any extra expense that might be occasioned by this adjournment.

Mr. COMMISSIONER PHILLIPS now observed, upon looking into the schedule, that the woman was a coffee-house keeper, and that she petitioned as a non-trader. By the 6 Geo. 4, c. 16, s. 2, a coffee-house keeper was made a trader *eo nomine*. The petition was therefore untrue, and must be dismissed.

Lucas, amicus curiae, suggested whether, to bring the insolvent within the meaning of the words "a trader within the meaning of

the statutes now in force relating to bankrupts," it was not necessary that she should owe to one person a debt in her trade of 50*l.* or to two persons a debt of 70*l.*, or to three persons a debt of 100*l.*

Re ELIZABETH COYD.

Mr. COMMISSIONER PHILLIPS doubted that very much. To constitute a bankrupt three ingredients are necessary—a petitioning creditor's debt, a trading, and an act of bankruptcy; but to constitute a man a "*trader*" within the meaning of the statutes, he apprehended that only one of these ingredients was necessary, namely, a trading. A *trader* within the meaning of the statutes now in force relating to bankrupts, and "*a bankrupt* within the meaning of the statutes now in force relating to bankrupts," were not synonymous. Might she not be a trader, no matter what she might owe?

Cooke, amicus curiae, said, he did not think the amount of the debts in trade of the least importance to the decision of the question as to whether a man was a trader. The words were not "*a trader subject to the laws now in force relating to bankrupts*," but "*a trader within the meaning of the laws now in force relating to bankrupts*."

Nichols, amicus curiae.—And it did not go on to say, "*against whom a fiat could issue, and who had committed an act of bankruptcy*." If the amount of the debt was considered of importance, then it might be contended that a man could not take the benefit of this act, unless he was amenable to the bankrupt laws, and had committed an act of bankruptcy.

Mr. COMMISSIONER PHILLIPS said that clearly the amount of the debt had nothing to do with it.

Nichols observed, that if she owed more than 300*l.* she could not be relieved; she must go to prison, and come up under the 1 & 2 Vict. c. 110.

Mr. COMMISSIONER PHILLIPS said that she could not petition under this act (7 & 8 Vict. c. 96) again. All that had been done was useless, and she lost all the expense.

Petition dismissed.

INSOLVENT DEBTORS' COURT.

February 16, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS and Mr. COMMISSIONER PHILLIPS.)

*Re THOMAS LEWIS.**Right of appeal from the County Courts—Rehearing.**Held, that there is no jurisdiction in the Court for Relief of Insolvent Debtors in London to review, alter, or annul proceedings in insolvency in the County Courts.**Re THOMAS LEWIS.**Appeal from County Courts.*

NICHOLS moved for the insolvent's discharge from custody under an adjudication of the County Court at Carmarthen, upon the ground of the informality of the order. The circumstances under which the application was made are briefly these:— The insolvent was arrested on the 21st of June, and lodged in Carmarthen Gaol, upon which, on the 26th of October, he filed a petition as an insolvent debtor, and was heard in due course before J. Johnes, Esq., judge of the County Court in that town, who remanded him for eight months from the date of his vesting order, for contracting debts without reasonable or probable expectation of payment. The form of the adjudication was as follows:—

Order of adjudication pursuant to the Acts for the Relief of
Insolvent Debtors in England.

Order of adjudication.

In the County Court of Carmarthen, holden at Carmarthen, before John Johnes, Esq., judge of the said court, on the 16th day of December, 1847. In the matter of Thomas Lewis, a prisoner in the gaol of —, in the said county, whose petition and schedule filed in the Court for Relief of Insolvent Debtors, have been duly referred and transmitted to the said County Court, pursuant to the statute in that behalf. Upon hearing the matters of the schedule of the said prisoner, and upon examination made into the same, and upon the said prisoner's swearing to the truth of the same, and executing a warrant of attorney in pursuance of the said act: forasmuch as it appears to the said judge that the said prisoner has contracted various debts without having had any reasonable or probable expectation at the time when such debts were contracted of paying the same, it is adjudged and ordered that the said prisoner shall be discharged from custody and entitled to the benefit of the said act as to the several debts and sums of money due or claimed to be due on the 26th day of October, 1847, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf, from the said prisoner to the several persons named in the said schedule as

creditors or claiming to be creditors for the same respectively, or for which such persons gave credit to the said prisoner before the said time of making such vesting order, and which were not then payable, and as to the claims of all other persons not now known to the said prisoner who may be indorsees or holders of any negotiable security set forth in the said schedule so sworn to as aforesaid, so soon as the said prisoner shall have been in custody at the suit of one or more of the persons above mentioned for the period of eight months, to be computed from the said time of making such vesting order as aforesaid.

*Re THOMAS
LEWIS.*

*Appeal from
County Courts.*

JOHN JOHNES,
Judge of the said Court.

The informality of this order would be at once apparent to the court. According to what would appear to have been the judgment of the court, the insolvent was entitled to have been discharged forthwith as to all his creditors except those with whom the debts were contracted without reasonable expectations of payment whose names should have been specifically mentioned in the adjudication, and also that, as to them, the insolvent should be discharged at the expiration of the period of remand. The form used was applicable to the discretionary clause; but if the adjudication was founded upon that section, it would be void, because it exceeded the power given by that section. If the adjudication was founded upon the 78th section, it ought to have stated the names of the creditors. That was important for the insolvent, for if none of the creditors at whose suit he was remanded were detaining creditors, he would be discharged immediately. There could be no doubt that the adjudication was most informal. The non-insertion of the name of the gaol in which the insolvent was confined, in the blank, showed great carelessness; and the question submitted on behalf of the insolvent was, whether this court, under such circumstances, had jurisdiction either to discharge the insolvent, or annul the adjudication and direct a proper order to issue in its stead. It was thought that as the County Courts were substituted for the Circuit Courts, over which this court had full authority to review the proceedings, and make any order to alter or annul them, it must still retain the same power over the orders and proceedings in insolvency in the County Courts.

The CHIEF COMMISSIONER read the 10th section of the 10 & 11 Vict. c. 102, which transfers the jurisdiction of the court to the County Courts, and, after conferring with Commissioner Phillips, intimated that this court had now no jurisdiction in the matter. The proper course was for the insolvent to apply to the judge of the County Court for a rehearing, under the 96th section of the 1 & 2 Vict. c. 110, who might annul the adjudication, and direct a proper order to be made.

Application refused.

INSOLVENT DEBTORS' COURT.

May 4, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re GEORGE WHITE.**Sale of real estate.**The provisional assignee may sell real estate vested in him, if the court shall so direct.**The court will permit real estate to be disposed of by private contract when an attempt has been made to sell it by public auction and it has failed.**Re G. WHITE.**Sale of real estate.*

COOKE on behalf of the provisional assignee, applied to the court respecting the sale of certain property under the following circumstances:—The insolvent was discharged in June, 1836, being entitled to a reversionary interest of certain property in the Isle of Wight upon the death of his father, who was now dead. It was now wished to sell this reversionary interest, and a Mrs. White, who had a life interest, was willing to join in the sale upon terms which had been agreed upon. The insolvent was in New Zealand. A purchaser had been found for the property, who would give for it 500*l.*, of which sum it was proposed that 231*l.* 17*s.* 6*d.* should be paid to the lady, Mrs. White, as her share, and 268*l.* 2*s.* 6*d.* to the insolvent as his share. The question was, how this was to be carried into effect. The 42nd section of the 1 & 2 Vict. c. 110, gave the assignee no power to sell real estate without the consent of the court. It was therefore necessary to have that consent in the first place. But then a difficulty arose as to the form of the order that would be made, for the 47th section of the act, which was highly directory, enacted that real estate should be sold by public auction. Under the circumstances, the question was what form of order should be made.

Form of order for sale of estate.

After some discussion the following order was made by the court, under the 42nd and 47th sections conjointly:—“ That the provisional assignee do sell by public auction the insolvent's said reversionary interest in the said premises (describing the premises) to the best purchaser or purchasers that can be got for the same; and that on receipt of the purchase-money the said provisional assignee do convey such reversionary interest to the purchaser or purchasers: and that, out of the money to arise from such sale, the

costs of the provisional assignee, of his application, and of such sale and conveyance and consequent thereon, be paid, and that the provisional assignee do pay the residue of such purchase-money, after payment of such costs, into this court to the credit of the said insolvent's estate; and that the said provisional assignee may be at liberty to fix the sum of 268*l.* 2*s.* 6*d.* as a reserved bidding for the reversionary interest, and in case no person or persons shall bid a higher price or sum than such sum, the provisional assignee, or the person appointed by him to sell the said reversionary interest, shall at the said sale declare that the same is not sold, but has been bought in on account of insolvent's estate."

*Re G. White.
Sale of real
estate.*

August 7.

Cooke applied for leave to sell the insolvent's reversionary interest by private contract. The property had been put up to auction by the provisional assignee, pursuant to the order of the court on the 3rd of July instant, at Yarmouth in the Isle of Wight; but there being no bidding to the amount of 268*l.* 2*s.* 6*d.*, the value of the insolvent's interest as fixed by the court, the property was not disposed of. The sale had not been effected, owing to the mistake of an agent. The purchaser which had been found was willing to buy the insolvent's reversionary interest by private contract, if the court should so direct; and he now applied for an order to that effect. The Court of Chancery had decided, in *Mather v. Priestman* (9 Simon, 352), that under these circumstances a sale by private contract was good.(a)

(a) *MATHER v. PRIESTMAN.*

July 27.

Although the Insolvent Debtors Act (7 Geo. 4, c. 57, s. 20,) directs the assignees to sell the insolvent's real estates by auction, yet if they have tried to sell them by auction and failed, a sale by private contract will be good.

THE plaintiffs were the assignees of an insolvent debtor, and had made an ineffectual attempt, within the time prescribed by the act, to sell the insolvent's real estates by auction. They, after that time had expired, sold part of the estates to the defendant by private contract, having previously obtained the consent of the major part in value of the creditors present at a meeting duly convened for that purpose.

The bill was filed for a specific performance of the contract, and the question was whether under the section of the act above referred to the assignees were authorized to sell the estates otherwise than by public auction.

The words of the section were—"And the assignees shall with all convenient speed use their best endeavours to receive and get in the estate and effects; and if such prisoner shall be interested in or entitled to any real estate, either in possession, reversion, or expectancy, such shall within the space of six months, or such other time as the court shall direct, be sold by public auction in such manner and at such place or places as shall be approved by the major part in value of the creditors." (Sect. 20, 7 Geo. 4, c. 57.)

Knight Bruce and Bethell, for the plaintiffs, contended that the language of that part of the section which related to the sale of the insolvent's real estate was affirmative and directory merely, and that it was nowhere enacted that if the estates were not sold by auction the sale should be void, (*The King v. The Justices of the Borough of Leicester*, 7 Barn. & Cres. 6; *The King v. The Inhabitants of Borough of Birmingham*, 8 Barn. & Cres. 29); that the language of the 24th section of the act was much stronger than the language of the 20th, for it enacted that no suit in equity should be commenced by the assignees without the consent in writing of the major part in value of the creditors, and yet it had been decided that

Re G. White. The learned counsel contended that, as the provisional assignee had made the attempt to sell the reversionary interest by public auction, as directed by the court, and finding no bidder to the amount fixed for the reserved bidding, he was justified in selling under the order of the court by private contract.

Sale of real estate. The CHIEF COMMISSIONER.—Let it be so upon the authority of the case cited, although I must confess it seems an odd way of dealing with an act of Parliament, which enacts that the thing shall be done in one way to order it to be done in another.

The order made was “That the provisional assignee be at liberty to sell by private contract, and to convey to G. S. the insolvent's reversionary interest in (*describing the premises*) upon receiving from the said G. S. the sum of 268*l.* 2*s.* 6*d.* the value of such reversionary interest, and the costs of the provisional assignee of this application.”

a suit might be commenced by the assignees without such consent: (*Piercy v. Roberts* 1 Myl. & Keen, 4; *Casborne v. Barsham*, 6 Simon, 317.)

G. Richards, for the defendants, said that under the 20th section of the act the assignees could not sell the insolvent's real estates otherwise than by auction, and if they could not sell them within the time mentioned in that section, they must apply to the Insolvent Debtors' Court to appoint a further time: (*Waybrond v. Howell*, 3 Russ. 376.)

The VICE-CHANCELLOR.—The objection raised by the defendant is unfounded. The first part of the 20th section of the act contains a *general* direction, that the assignee shall make sale of *all* the insolvent's estate and effects. The section then proceeds to enact that, within a certain time, the assignees shall sell the insolvent's real estates by public auction; but the act nowhere enacts that they shall be sold in no other manner than by public auction; therefore the general direction for sale in the previous part of the section still remains in force; consequently if the scheme of selling by auction has been tried and failed, the assignees were justified in selling by private contract.

INSOLVENT DEBTORS' COURT.

January 11, 1849.

Protection Case.

Re JOSEPH ROBERT HARRIS.

Petition.

An insolvent must describe himself in his petition by all the names in which he has contracted debts.

THIS insolvent appeared for his examination upon his interim order. His baptismal name was Joseph Robert Harris, and he had petitioned in that name, but it transpired that he had accepted four bills in the name of Joseph Harris, but had not described himself in that name. He had also sent out some circulars in the name of Joseph, but that was owing to a mistake of the printer, as the petitioner did not see a proof until the circulars were printed.

The CHIEF COMMISSIONER said, that there was no doubt but that he must inscribe his baptismal name in his petition, but the question there was, whether he must not do something more, and go further, and describe himself by all the names in which he has contracted debts. He was of opinion that he ought, and therefore he should dismiss the petition.

The petitioner's attorney applied to have the brokers' papers delivered out to file with a new petition.

The CHIEF COMMISSIONER observed, that the petitioner's circumstances might be extremely different, and declined to grant the application.

*Re JOSEPH
ROBERT
HARRIS.*

Petition.

INSOLVENT DEBTORS' COURT.

January 15, 1848.

(Before Mr. COMMISSIONER PHILLIPS.)

*Re RANNEY.**Vexatious defence—Petition.**A taxed bill of costs must be produced to enable the Court to pronounce a remand for the vexatious defence of an action.**Every business which an insolvent has carried on must be mentioned in his description.**Re RANNEY.**Vexatious
Defence
Petition.*

THIS insolvent appeared for his hearing. It appeared that he had acted as a commission agent for nearly a twelvemonth, but he had not described himself as such.

Mellor further opposed, upon the ground of the vexatious defence of an action. Evidence having been put in,

Nichols, for the insolvent, said that there could be no vexatious defence if there had been no trial.

Mr. COMMISSIONER PHILLIPS.—Why, I do not know that; if unnecessary costs should be run up to trial, and then, just before, the plea withdrawn.

Nichols.—It has been uniformly held here that, unless a taxed bill of costs is produced, there can be no remand on that ground.

Mr. COMMISSIONER PHILLIPS.—There may be many cases in which the costs have been taxed, in which there has been no trial. I do not hold the doctrine that there must be a trial, but I hold that there must be a taxed bill of costs. That certainly was required by the court. In a recent case, in which an insolvent had been warmly opposed by a person not very familiar with the practice of the court, he had been very much pressed to remand upon this ground, in the absence of the taxed bill of costs; indeed, so hard was he pressed, that he was induced to send the point for decision to Mr. Commissioner Harris, to whose court the case properly belonged, but that learned commissioner decided that the Master's allocatur must be produced. He, therefore, never could remand for the vexatious defence of an action, unless a taxed bill of costs was produced. The opposition on that ground would, therefore, be disallowed. But as the insolvent had omitted to describe himself as a commission agent, he must adjourn the case to amend and re-advertise.

Adjourned accordingly.

INSOLVENT DEBTORS' COURT.

November 1, 1848.

(Before Mr. COMMISSIONER LAW.)

Re JOHN KEENE.

Jurisdiction of the Court for Relief of Insolvent Debtors, and the County Courts as to re-hearing.

The Court for Relief of Insolvent Debtors in London has no power to direct the re-hearing or re-examination of an insolvent.

THIS insolvent came up for his hearing before the judge to whom the case was allotted by the Court for Relief of Insolvent Debtors on the 12th of June last, when he was remanded for six months under the 76th sect. of the 1 & 2 Vict. c. 110, for having fraudulently made a bill of sale to particular creditors of all his estate and effects about three months before his insolvency, under which remand insolvent still remains in Gloucester Gaol. Since the hearing it was discovered that the insolvent had fraudulently made away with and concealed certain property, and for this reason, Mr. Hawkins, the assignee, was desirous of having the insolvent brought up for a re-hearing before the judge of the County Court, that, on proof of these facts, he might make the order of discharge conditional upon giving up the property fraudulently concealed.

Accordingly, upon a former day, an application was made to Mr. Commissioner Harris to direct a re-hearing; but, upon considering the point, that learned commissioner suggested whether it would not be better to move the court under the 98th section of 1 & 2 Vict. c. 110, which in all cases heard by itself, or a commissioner on circuit, or any justice of the peace within the town of Berwick-upon-Tweed, empowers the court, upon the application of any assignee, to order a re-examination of the insolvent to take place either before the court, or a commissioner, or a justice of the peace in Berwick, after his discharge. The suggestion of the learned commissioner being acceded to, a rule was granted upon the insolvent to show cause why he should not be further examined touching his estate and effects. The rule was made returnable to-day before Mr. Commissioner Law.

Cooke showed cause.—He would decline going into the merits, as the first question was, whether this court had jurisdiction. The

Re J. KEENE.
Jurisdiction.
Re-hearing.

Re J. KEENE. matter was transferred altogether to the County Court, and if they wanted a further examination, they must go there. The question was, whether this court, under any section, was authorized to send this man again for examination or hearing before the County Court judge. The section transferring the jurisdiction was the 10th of the 10 & 11 Vict. c. 102. That limited the power of the court to making one order, which transferred everything; and he submitted that this court had nothing further to do with it. (The learned counsel here read the 10th section.) He conceived that that clause distinctly and in terms put an end to the jurisdiction of this court. From the moment of the order of reference, all future orders of every description were transferred. This court had nothing further to do with it, and had no power and no authority whatever; and any application "requisite for the discharging or remanding of such prisoner, *and otherwise* respecting such prisoner, his schedule, creditors, and assignees" (s. 10), must now be made to the judges of the County Courts. Therefore this case was *coram non judice*. He submitted, therefore, that the rule should be discharged.

Douze, who originally obtained the rule, thought that his learned friend was putting too large a construction upon the act. After the schedule and all the papers were returned to this court, and nothing remained on record in the County Court except the minutes of the judge, it was not too much to suppose that the jurisdiction returned with them. The jurisdiction given to the County Courts by the 10th section of 10 & 11 Vict. c. 102, was entirely confined to within that period. The meaning of the word "otherwise" in the clause was to embrace those cases in which the adjudication was only conditional, or where there were adjournments, or other similar matters, other than the mere discharge or remand. It was every day's practice to appoint assignees in those cases in this court.

Mr. COMMISSIONER LAW.—The management of the estate remains here; but the objection taken by the learned counsel (*Cooke*) was to a second hearing of the insolvent, by order of this court.

Douze.—How can a second hearing of an insolvent's case take place in the country, when all the papers are in this court?

Mr. COMMISSIONER LAW.—If the judges of the County Courts have occasion for the records, to the right fulfilment of their duties, they shall have them again.

Douze said, that in the cases heard before magistrates he believed that applications for a re-hearing or re-examination must be made to this court, and, by analogy, when cases were heard before the County Court judges, the same practice should apply.

Mr. COMMISSIONER LAW.—The 98th section especially provides for that, and the town of Berwick-upon-Tweed was the only country jurisdiction that remained to justices—that was to say, from 1838 to 1847.

Douze submitted that this court had jurisdiction.

Mr. COMMISSIONER LAW.—If this legal question of jurisdiction *Re J. KEENE.* did not arise, I should still say that no ground was laid for this court to act. There has been a judgment of six months' imprisonment awarded by the judge of the County Court, and there are no grounds given to me, from which I can say that the misconduct now alleged was not the act for which he was remanded. On the merits I cannot act. But, on the question of jurisdiction, not feeling any doubt, I am ready to say I think I have not jurisdiction. The learned counsel has not shown that I have, but gave grounds for showing that the County Court judge had not jurisdiction; but I think he has, and that I have not. The new act abolished the circuit jurisdiction of this court. The 98th section of the 1 & 2 Vict. c. 110 had reference to the administration of that jurisdiction by this court, which being abolished, the portion of the clause referring to it fell also. The other question was, whether there were any general powers given by the act which would authorize this court to assume jurisdiction, but none such were given. This court can do nothing towards the discharge or remand of an insolvent. It cannot hear—it cannot re-hear; and it seems to me to follow, that if we cannot meddle with the original hearing, how can we estimate the fitness of hearing it over again? Look to the words of the clause. The circuits are abolished. By that alone our jurisdiction ceases. But still we may look for enabling words, and the only enabling words are those enabling this court to make an order referring those cases. All powers of hearing are taken away, and the words that follow are those enabling the County Court judges to hear and re-hear. I think the large words that follow do give the County Court judges jurisdiction; but whether they will act upon them or not, is a question for themselves.

Jurisdiction.

INSOLVENT DEBTORS' COURT.

July 12, 1848.

(Before Mr. COMMISSIONER PHILLIPS.)

*Protection Case.**Re MATTHEW BROMLEY.**Who may petition.*

Where one judgment creditor had been allowed to sweep off a petitioner's property, and he subsequently petitioned for protection: Held, that he had not complied with the condition mentioned in the act, but had chosen to wait until his estate was gone, and was therefore not a person entitled to the benefit of the statute.

*Re MATTHEW BROMLEY.**Who may petition.*

THIS insolvent appeared for his interim order, and it appeared in evidence that one creditor had obtained a judgment and been allowed to sweep away all his property.

Mr. COMMISSIONER PHILLIPS said that, if a man who was sued delayed his application for protection until after the plaintiff had obtained a judgment and swept away the property, he would not give a protection, as he considered it a condition precedent to relief under these statutes that a man who had an estate should come to that court to have it duly distributed. "So as nevertheless their estates may be duly distributed amongst their creditors" (5 & 6 Vict. c. 116, s. 1) were the words of the act. The statute was intended to protect a man who had given up his estate to be divided amongst *all his creditors*, and not for a man who had allowed one creditor to have it all to protect him against the rest. In such cases he never would grant protection. He had no jurisdiction.

Petition dismissed.

Note.—The general principle recognized in this case is, that a man who has an estate must not wait until it is gone before he applies for protection. Unfortunate persons, when they find themselves embarrassed, should petition the court, and give up their property.

INSOLVENT DEBTORS' COURT.

November 8, 1848.

(Before Mr. COMMISSIONER LAW.)

*Re JOSEPH JACOBS.**Assignee.**Assignees will be allowed at the rate of five per centum as a remuneration for the performance of their duties.*

UPON the audit of the accounts of the assignees of this insolvent, the learned Commissioner found that, after deducting all costs, the sum in hand belonging to the estate amounted to 212*l.* 12*s.* The debts of the insolvent amounted to 1,004*l.* 16*s.* 10*d.*, and a dividend was ordered of four shillings in the pound. The amount required for the dividend was 200*l.* 19*s.* 6*d.*, and Mr. Commissioner Law directed that the balance of 11*l.* 12*s.* 6*d.*, in the assignee's hands, should be retained by him as remuneration for the performance of his duties in getting in and distributing the estate.

*Re JOSEPH JACOBS.**Assignee.*

Note.—Provided always, that it shall be lawful for the said court to direct any fee or remuneration for the performance of duties in getting in and distributing the estate of any insolvent debtor, whether by any assignee, or by the provisional assignee, in case of such distribution being effected without the appointment of any other assignee, which shall not exceed the rate of five per centum on the sum received as produce of such estate: (1 & 2 Vict. c. 110, s. 45.)

INSOLVENT DEBTORS' COURT.

October 18, 1848.

(Before the CHIEF COMMISSIONER.)

*Protection Case.**Re JOHN EDMOND O'BEIRNE.**Practice—Discharge.*

An insolvent arrested between the hour of filing his petition and that in which he obtains the protection signed by the Commissioner will be discharged.

LUCAS applied for the discharge of this petitioner from custody. It appeared that it was a rule in the office not to grant the protecting order until the day after the petition is signed. The protec-

Re JOHN EDMOND O'BEIRNE.

*Re JOHN
EDMOND
O'BEIRNE.*

*Practice—
Discharge.*

tion was granted in this case on the 12th instant, and the petition filed on the 11th instant, and after the petition was filed the insolvent was arrested. Notice of this application had been given to the detaining creditor on the preceding day, 17th October.

In bankruptcy it was the practice to grant the protection upon filing the petition as a matter of course. He suggested whether the protecting order might not be dated back. In point of law it would revert back, for the words of the act were, that upon filing the petition protection shall be granted.

The detaining creditor did not appear.

The CHIEF COMMISSIONER said he did not feel fully persuaded that he was doing right, but he would grant the application.

INSOLVENT DEBTORS' COURT.

February 26, 1849.

(Before Mr. COMMISSIONER PHILLIPS.)

Re WILLIAM DANCER.

Assignee.

Women will not be appointed assignees.

*Re WILLIAM
DANCER.*

Assignee.

CRESWELL applied that Elizabeth Vanveer, executrix of Francis Vanveer, who had originally been appointed assignee, might be appointed assignee.

Mr COMMISSIONER PHILLIPS.—Can women be appointed assignees?

Creswell remembered a case in which the Chief Commissioner had appointed a female assignee.

Mr. COMMISSIONER PHILLIPS.—That must have been a long time ago, and before the change took place in the law enabling the court to appoint other persons than creditors assignees. Since that alteration was made in the act, I am informed, by the Chief Commissioner, that the court has refused to appoint women. I refused a similar application the other day and must do so on the present occasion.

Application refused.

INSOLVENT DEBTORS' COURT.

December 22, 1847.

(Before Mr. COMMISSIONER LAW.)

*Protection Case.**Re JOHN WILLIAMS IDE COZENS.**Interim order—Discharge—Costs in an action of ejectment.**Insolvent was in custody for costs in an action of ejectment brought by himself. Held, that the court may grant an interim order, although it will not discharge him from custody.***C**RESSWELL opposed for James Brewster Cozens, the detain- *Re J. W. IDE
COZENS.**Cooke supported.**In the course of the examination it transpired that insolvent was in custody for costs in an action of ejectment brought by himself.**Interim order—
Discharge.***M**r. COMMISSIONER LAW inquired whether he had jurisdiction. *Cresswell submitted that he had not.***C**ooke said that there was no doubt that the insolvent was entitled to be heard, although the court could not discharge him immediately.**M**r. COMMISSIONER LAW said,—Is there such a thing as giving an interim order without a discharge from custody?**C**ooke.—There is. In the Court of Bankruptcy, in these kind of cases, they go on, notwithstanding that at this stage they have no power to liberate the petitioner, and then at the final order they discharge him or not, as the case may be.**M**r. COMMISSIONER LAW.—What are their forms? There can be no interim order.**C**ooke.—The party is brought up under the 7th sect. 7 & 8 Vict. c. 96, in custody.**M**r. COMMISSIONER LAW.—Is this an application under that statute by mistake?**T**he Attorney.—I advised the insolvent to petition under the 1 & 2 Vict. c. 110, but he said he could get out sooner under this act.**M**r. COMMISSIONER LAW.—It is perfectly marvellous that a person who must lie in prison till discharged by the final order should petition under this act. One would suppose that every man who came there must come for personal liberty, and that I cannot grant.

*Re J. W. IDE
COZENS.*

Interim order—
Discharge.

Cooke.—The court cannot discharge this insolvent if his case was the hardest in the world. The statute did not give the court power to discharge any but "prisoners in execution upon any judgment obtained in any action for the recovery of any debt." (Sect. 6.) Where he is in custody for the costs, the court has no power to discharge him.

Mr. COMMISSIONER LAW.—First of all, I have to decide whether I have jurisdiction. But it is difficult to conceive why a man should prefer petitioning under this act of Parliament. The difference between the two systems is this: that in the one, the creditors are only able to take his property through the medium of this court, which apportions it in equity and fairness, taking into consideration the situation of all the respective parties; while under the other system, the insolvent is an uncertificated bankrupt as long as he lives.

Cooke.—And may be sued and his property attached every day of his life.

Mr. COMMISSIONER LAW.—The first act says that certain persons may petition, and thereupon it shall be lawful for the commissioner to give protection, and the act seems to contemplate no case in which the interim order is impossible.

Cooke.—Any man in custody in any cause may petition, and in certain cases the court cannot appoint a day for the final order, but it may hear him, and grant the final order.

Mr. COMMISSIONER LAW.—The question is, whether the insolvent can be a petitioner for an interim order. The only section that bears upon the point is the 7th clause. The 6th section, taken alone, is very strong to show he cannot. The 7th section may furnish a sort of argument in its favour. It is an enabling clause. The 6th section provides for protection from process, and no other person but a prisoner in execution for debt can petition. That 7th section you may discuss if you like. It commences, "That whenever any such petitioner." This person is not "such petitioner," and is not entitled to his discharge "in manner aforesaid;" but still he must be "such petitioner." The importance of the question is as to jurisdiction and to the validity of title in an assignee. If there is no jurisdiction, there will be no title to an assignee hereafter. Up to the 6th section the party could not petition, but then comes the 7th section.

Cooke.—The court must say whether this is a case in which the court will name a day for the final order. The first section enables every person to petition, and gives power to the court to grant a final order in certain cases. The 6th and 7th sections under the 7 & 8 Vict. c. 96, are assisting auxiliary sections to enable the court to bring up a prisoner; and the court has power to grant an interim order, although it would not discharge him, but the final order would.

Mr. COMMISSIONER LAW.—Assuming for the moment that there is jurisdiction, does Mr. Creswell wish to go further, and apply for a rule to show cause?

Creswell.—No.

Mr. COMMISSIONER LAW.—Then I shall consider the point.

*Re J. W. IDE
COZENS.*

December 24.

The court intimated that the interim order had been granted.

INSOLVENT DEBTORS' COURT.

January 23, 1849.

(Before Mr. COMMISSIONER HARRIS.)

Protection Case.

Re EDWIN EDWARD MERRALL.

Distribution of estate.

A petitioner, who has assigned his property to trustees for creditors within three months prior to the date of his petition, must pay the full value of it into court or the petition will be dismissed.

THIS insolvent appeared for his interim order. He had petitioned on the 23rd December, 1848. It appeared from his special balance-sheet that he had made an assignment of his property to a creditor and a relative for the benefit of his creditors in November, 1848.

Cooke, for the opposing creditor, submitted that this was a parting with property, neither in the ordinary course of business, nor for the necessary support of himself and family, and that the petition consequently could not be sustained.

Sargood, for the insolvent, said that there was no object in the assignment but the benefit of creditors, and the trustees were ready to pay into court the value of the property sold.

Mr. COMMISSIONER HARRIS.—Well, pay the money into court.

Sargood said that certain charges and expenses of the sale, &c. must be deducted.

Cooke said that the answer to this was, why did not the insolvent petition before he made the assignment? It was clear he had gone the wrong way to work.

Sargood submitted that this was not a parting with property, but merely asking others to hold it who could better do so. The

*Re E. E.
MERRALL.*

Re E. E. MERRALL. trustees were ready to account for the property and pay the balance into court.

Mr. COMMISSIONER HARRIS said that insolvents should come to that court before they proceeded to distribute their property. There had been no notice to creditors of this assignment to his sister and another person, perhaps a friendly creditor. He thought it was a parting with property within the meaning of the act of Parliament. It is a private assignment, and property has been made away with within three months of the date of the petition, and there was an end of the case.*

Petition dismissed.

INSOLVENT DEBTORS' COURT.

January 23, 1849.

(Before Mr. COMMISSIONER HARRIS.)

Re JOHN PALMER.

Practice—Commitment—The Poplar Gaslight Company.

The public officers of a company neglecting to obey the order of the court for the transfer of certain shares belonging to an insolvent into the name of the provisional assignee will be committed to the Queen's prison.

Re J. PALMER.
Practice—Public company.

UPON a former day an order had been made by the court for the transfer of three shares standing in the name of the insolvent in the books of the Poplar Gaslight Company into the name of the provisional assignee, for the benefit of the creditors under the 54th section of the 1 & 2 Vict. c. 110, which enacts that, if at any time before a prisoner shall become entitled to his final order under the act he shall have any Government stock, funds, or annuities, or any of the stock of any public company, either in England, Scotland, or Ireland, standing in his own name in his own right, it shall be lawful for the court, whenever it shall deem fit so to do, to order all persons whose act or consent is

* It has been laid down that an insolvent ought not to distribute his own estate when all creditors are not agreed on the distribution. He ought at once to apply to the court. An insolvent executed an assignment of his effects for the benefit of his creditors, all of whom would not join in it—he paid those who did; no one opposed—but Mr. Commissioner Holroyd said that he ought to have come to the court when he proposed to divide. Instead of so doing, he had taken the distribution on himself, and now came when there was nothing to divide. This was not a case within the act. (see Horry's Insolvent Practice, p. 29.)

necessary thereto, to transfer the same into the name of the assignee *Re J. PALMER.* or assignees; and all persons whose act or consent is necessary for all things done or permitted pursuant to such order. The transfer ^{Practice—Pub-}
^{lic company.} not having been made by the directors of the company, as directed by the court on the 17th of November, 1848, a rule was obtained upon the 12th of January, 1849, upon William Horne, a director of the company, and Mr. William Smith, the secretary, to show cause why "they should not respectively be arrested and committed to the Queen's prison for contempt of court, in disobeying the rule of the 7th of November."

Cooke, in obtaining the rule, said, that the transfer ought to take place as a matter of right, under the 54th section; and if companies refused or neglected to register the shares as directed, the court had full power to enforce its own order. There was power to make it under the 54th section, and the 66th section showed how it was to be enforced,—namely, by arrest and commitment of the parties obeying the order.

To-day, no cause being shown,

Cooke moved to make the rule absolute.

The *Solicitor* of the company put in an affidavit, stating that since the notice of the rule came to his hands he had not had time to instruct counsel.

Cooke said that the company had abundance of time to instruct counsel. The court had made an order. The only question now was, had the company obeyed it?

The *Solicitor* said, that the delay in the transfer had taken place in consequence of there being other claimants to the shares.

Cooke said that that question had previously been investigated both by Mr. Commissioner Law and also by the court as then constituted. The company should have obeyed the order, in doing which they could not run any risk, as the act provided an indemnity.

Mr. COMMISSIONER HARRIS.—Has the order been made a rule of court?

Cooke.—Yes, and the services are sworn to regularly.

Mr. COMMISSIONER HARRIS said, that the rule must be made absolute, but as the solicitor of the company complained of want of time, the service of the rule only coming to him three days previously, the warrant of commitment should remain in the office for a fortnight, to give them an opportunity in the mean time of taking the proper steps to set aside the order.

*Rule absolute; the warrant to remain
in the office for a fortnight.*

INSOLVENT DEBTORS' COURT.

January 4, 1848.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re JOHN DILLON the Younger.**Detainer subsequent to remand.*

An insolvent, detained in prison after the period of his remand has expired, at the suit of a creditor whose detainer was lodged subsequently to the hearing, and whose debt is inserted in the schedule, will, on application to that effect, be discharged by the court.

*Re JOHN
DILLON, the
Younger.*

Detainer.

THIS insolvent had been opposed at his hearing by a creditor named Charles Buchanan, at whose suit he was remanded for six months from the date of his vesting order. This creditor had subsequently lodged a detainer against him at the Queen's prison, and to-day

Nichols moved, "That a warrant may issue for the discharge of the insolvent, a prisoner at the suit of Charles Buchanan, a detaining creditor since the insolvent's hearing." The period of remand expired on the 3rd of January, 1848, and he applied upon an affidavit that the debt for which he was detained was the same as that inserted in the schedule.

The court directed the warrant to issue.

INSOLVENT DEBTORS' COURT.

*January 12, 1849.**Re THOMAS MOORCOCK.**Practice—Oppositions by a corporation—Notice of opposition.**Incorporated associations must oppose by an authority under the seal of the corporation.**Notice of opposition properly entered in the office by the agent or solicitor of a corporation need not be under seal if the act is properly ratified by the company previous to the hearing of the opposition.*

*Re THOMAS
MOORCOCK.*

Opposition by a
corporation.

THIS insolvent came up for his hearing upon a former day, and was opposed by *Wilkins, Serjt., and Dowse*, for the North American Colonial Association for Ireland.

Cooke (with whom was *Edwin James*) for the insolvent, objected

to the opposition, as there was no authority for the act under the seal of the corporation. *Re Thomas Moorcock.*

Mr. COMMISSIONER HARRIS adjourned the case to produce an authority under seal for that purpose. *Opposition by a corporation.*

To-day all parties again appeared, pursuant to adjournment, when an authority under the seal of the corporation being produced, and the seal proved by the solicitor, who, upon cross-examination, deposed that it was duly affixed, the opposition was allowed.

Cooke now objected that the same authority which was requisite to authorize an opposition at the hearing, was necessary to authorize the entry of the notice of opposition in the office. No notice of opposition had been given by the proper authority; notice had been entered by a person who had no authority. As well might a stranger have walked into the office. Notice must be entered by a creditor, or by some person duly authorized by a creditor. That was laid down by no less authority than an Act of Parliament (sect. 72 of the 1 & 2 Vict. c. 110). The court could not take away this man's right given to him under an act of Parliament. The authority to enter the opposition must be just as powerful and as duly executed as to authorize an opposition at the hearing. They stood upon the same foundation. The one was as necessary as the other. If the solicitor of the association had no right himself to enter notice of opposition he could not delegate the right to another. Until an authority was duly prepared under the seal of the corporation, they had no right to enter notice of opposition. As the notice had been entered before that document was prepared, he submitted that it was invalid; and, as no properly authorized notice had been given, they had no right to oppose.

Edwin James followed.—There were two duties prescribed by the act; a duty devolved upon creditors to give notice of opposition to debtors, and a duty devolved upon debtors to give notice of the hearing to creditors. Notice of opposition had been entered by no person duly authorized under the seal of the company. They must rely upon a subsequent ratification. Could a party who was clothed with no authority do an act as against an insolvent which required to be subsequently ratified? He submitted that they could not, *ex post facto*, make a right as against an insolvent which did not exist at the time the act was done.

Wilkins, Serjt., and *Dowse* were not called upon to reply.

Mr. COMMISSIONER HARRIS said that the right to enter the notice existed. Notice of opposition had been entered and the company had ratified the act.

Opposition allowed.

INSOLVENT DEBTORS' COURT.

(Before Mr. COMMISSIONER LAW.)

*Protection Cases.**June 26, 1848.**Re JAMES HENRY HANCE and JOHN ROBY.**Debts under former insolvencies.—Second petitions under the Protection Statutes.**Held that the debts in schedules, filed under the provisions of the 1 & 2 Vict. c. 110, will be excluded in estimating the liabilities of a petitioner upon a subsequent application to the court for protection under the 5 & 6 Vict. c. 116, the 7 & 8 Vict. c. 96, and the 10 & 11 Vict. c. 102.**Held, also, that the effect of granting a protecting and a final order to a petitioner, under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, is to place him, with respect to property, in the same condition as an uncertificated bankrupt.**Held, also, that a fiat against an uncertificated bankrupt is invalid.**Held, also, that as the Protection Statutes are to be construed by analogy to the law of bankruptcy, except where otherwise expressed, a second protection and final order would be void in law if granted, and that, consequently, second petitions under these acts will not be received.**Re JAMES HENRY HANCE AND JOHN ROBY.**Debts under former insolvencies—Construction of the Protection Statutes.*

THESE petitioners, under the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 98, appeared respectively for examination upon their interim orders. It appeared that Roby, before his present application under these statutes, had been three times discharged by this court under the 1 & 2 Vict. c. 110, namely, in January, 1831, when his debts amounted to 891*l.* 0*s.* 4*d.*; in October, 1822, when his debts amounted to 682*l.* 7*s.* 4*d.*; and again in 1840, when his debts amounted to 786*l.* 6*s.* 6*d.* He had not inserted these debts which were unpaid in his schedule, and it was objected that he ought to have done so. In the case of Hance it appeared that he was a bankrupt in November, 1828, when his debts (still unpaid) amounted to 2,000*l.* He petitioned this court in December, 1820, when his debts (still unpaid) amounted to 8,240*l.* He petitioned the court again in May, 1825. His debts upon that occasion (still unpaid) amounted to 1,328*l.* 14*s.* 6*d.* He petitioned again in March, 1833, when his debts amounted to 932*l.* 4*s.* He petitioned the Court of Bankruptcy in 1844, but his petition was dismissed. He again petitioned the Court of Bankruptcy, under the Protection Statutes, in July, 1845, when his debts were 1,554*l.* 13*s.* 11*d.* He now petitioned this court under the same statutes. He had not been a trader since 1833, when he took the benefit of the old Insolvent Act. It was objected by *Nichols*, who opposed for a creditor, that his old debts in trade should be inserted in his

present schedule; and if so, he was a trader, owing debts amounting in the whole to more than 300*l.* and his petition must be dismissed.

Cooke, who supported the insolvent, was heard *contra*.

The case, together with that of *Roby*, were adjourned till to-day, that the point might be fully argued.

Cooke submitted that it was not necessary to insert the debts under former insolvencies in his present schedule. It was said that there was some difference between the Protection Statutes and the 1 & 2 Vict. c. 110, in this respect. By the 5 & 6 Vict. c. 116, he was required to file a schedule containing all his debts, but he did not find that direction differed in any respect from the enactments respecting the schedule in the 1 & 2 Vict. c. 110. The word "debt" was mentioned in both, and was not qualified in either. The practice of the court did not formerly require the insertion of these debts in schedules filed under the 1 & 2 Vict. c. 110, and the reason was, that they were not debts in the ordinary sense of the word. All the ordinary incidents of debts were taken away. The liability to be sued and taken in execution was done away with by the 90th and 91st sections in respect of these debts. If he was arrested it was provided that he should be released upon application to a judge. And an execution against his goods would be inoperative, for it was provided that his property should not be liable, except under the order of this court. It was true the debt still remained, but how? According to the act, for a specific purpose. It was only *sub modo*, that these debts could be satisfied. How then could they be said to exist as ordinary debts? As a provision was already made under the statute, it was not necessary to have them inserted in the second schedule. As to the practice in this court under the 1 & 2 Vict. c. 110, it was never required to insert debts under former insolvencies. What would be the effect of that, supposing it to be done? Why the creditors in the first schedule would be entitled to share again in property mentioned in subsequent schedules. That was contrary to the practice of the Court of Chancery, which decreed, in *Barton v. Tattersall*, 1 Russ. & M. 237, that under the last schedule should be paid first. The court there drew a distinction between the schedules, and would not allow them all to be marshalled equally. Now, if the word "debt" was to govern all, such a distinction as was made in that case could not hold. Although the debts were kept alive, it was not in the ordinary way, but for a particular purpose, and to effect that purpose it was only necessary to insert them in one schedule. It was no more necessary to insert these debts in schedules under the 5 & 6 Vict. than it was necessary formerly to insert them in schedules under the 1 & 2 Vict. There was no distinction in terms; there was no distinction in principle; and there must be a very strong reason to induce the court to depart from its former practice. He knew, also, that it was not a fixed practice formerly, amongst the commissioners in bankruptcy, to require the insertion of these debts. He recollects that he

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made an application to Sir Charles Williams, in the case of *Matthews*, and that learned commissioner inquired what the practice of the Court for the Relief of Insolvent Debtors was, and upon being informed that this court did not require the insertion of these debts, "Then I shall not require it to be done." Mr. Commissioner Shepherd after his death did the same thing.

Mr. COMMISSIONER LAW.—The question is not whether it is convenient to state that a certain amount of debts are owing under former insolvencies, but the question is, whether, for the purpose of proof, and dividend, and notice, they are creditors.

Cooke.—Yes, if for those purposes the old creditors are inserted in the protection schedules, it must also be done under the 1 & 2 Vict. c. 110, which would be a most inconvenient course of practice. The principle recognised must be the same in both cases. If it was adopted in one case it must be in the other, and if so, all the old creditors must come in *pari passu* with the new ones, and that would upset the whole practice of the court, which had hitherto been found to be exceedingly convenient.

Duncan (who supported the insolvent Roby) followed in support of the same line of argument, and said that the insolvent, John Roby, petitioned that court under the 7 & 8 Vict. c. 96, and the question was whether debts in his schedules under previous insolvencies, under the 1 & 2 Vict. c. 110, should be inserted in his present schedule. He would read the definition of the word "debt," which he found in a very old writer (*Les Termes de la Ley*, 1685), and in Holthouse's Law Dictionary, p. 130, title "Debt," 1846;—"The legal signification of debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum, a bill of exchange or a promissory note, or a rent reserved on a lease where the quantity is fixed and specific, and *does not depend upon any subsequent valuation to settle it*. The non-payment of these is an injury for which the proper remedy is by action of debt, to compel the performance of the contract, and to recover the specific sum due. Debts are either debts of record, specialty debts, or simple contract debts." It was essential that there should be a remedy at law to constitute a debt, and no writ could issue or other proceeding be taken at common law for the recovery of the debts inserted in these schedules; therefore, one main legal ingredient to constitute a debt was taken away, and there could be no debt in law. But if there was any doubt as to the interpretation of the word debt, the preamble of the 5 & 6 Vict. c. 116, would clear it up. The preamble recited that the object of the act was to protect from all process in respect of the debts entered in the schedule. Now he required no protection from the debts entered in the schedules under his previous insolvencies; therefore, it was plain that these words of the statute must be taken to mean protection from debts contracted since his late insolvency.

Nichols, contra, said, with regard to the argument of *Duncan*, that there was no debt in point of law, it was too late to argue

that point, because the courts of law had decided that they were debts, and if so, they must be shown to be discharged by legal means. Were these debts discharged by a deed under seal or barred by a certificate? The question then was, how were they debts? By the 91st sect., "no writ of *fieri facias* or *elegit* shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof; and if any suit or action shall be brought, or any *scire facias* be issued, it shall be lawful for him to plead his discharge," &c. It was clear from this that no action or suit was to be brought against a discharged insolvent in respect of the debts from which he was discharged.

Mr. COMMISSIONER LAW.—You do not quote the whole words of the clause. You leave out a very material part—"No action shall be brought, except upon the judgment entered up against such prisoner according to this act."

Nichols.—This section takes from the creditor every right of suit. It seemed to take away from the creditor all right of suit except the remedy on the judgment. That was rather in favour of his argument, because his argument was, that although some of the legal remedies were taken away, yet the debt was not extinguished. The objection was, that if the right of suit was taken away, no character of a debt remained. But there were many other modes as well as remedy by suit. A landlord might distrain.

Mr. COMMISSIONER LAW.—That right was specifically reserved by the statute.

Nichols.—Supposing at the time of petitioning six years' rent were due to the landlord, and he gets one year's rent, and there were five years' rent unpaid; and the insolvent returned to the premises and brought property upon them, the landlord could distrain upon it. The right of distress existed for any period short of six years. That was a recognized incident of a debt due to a landlord. This incident of a debt also existed. The instances were rarer, but the power existed. An attorney, or other person who was a creditor in the schedule for costs, had a general right of lien. The protection given to an insolvent must be taken according to the plain letter and meaning of the statute. Although protection was granted, they were debts still, and within the meaning of the 5 & 6 Vict. c. 116. In bankruptcy they may prove for these debts, and receive a dividend. He would now look at the argument of his learned friend Mr. Cooke. The practice of the court under the 1 & 2 Vict. c. 110, was not to require the insertion of old debts. That practice was in perfect consistency with the meaning of the statute, but the weakness of his argument was, that the cases were not parallel. This was not a question of two schedules, under the 5 & 6 Vict. and 7 & 8 Vict. c. 96. In the protection schedules there was no reason why the debts

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should be inserted again in subsequent schedules, as he could only get the same protection over again.

Mr. COMMISSIONER LAW.—Except that the act says they shall be inserted.

Nichols.—Although it was in the words, it was not within the intent, of the Legislature, because he did not want it. It might fairly be concluded that it was not the intention of the Legislature. The learned counsel argued at great length that there was a material distinction between the prison statutes and the protection statutes upon the person and property of petitioners, under them respectively.

Sandford, who opposed Roby, was heard.
Cooke replied.

Cur. adv. vult.

JUDGMENT.

Mr. COMMISSIONER LAW said, the petitioner, James Henry Hance, seeks protection as a non-trader. It is objected that he ought to include in the list of debts certain old debts as to which he was discharged by this court a few years ago; and that this brings with it the necessity of calling himself a trader, some of these debts having been contracted by him when in trade. And then it is urged that, being a trader owing 300*l*. he cannot petition under the new acts. I will pass at once to the point which has been argued, whether the debts of a former prison insolvency are to be included. Does the party petitioning come before us owing those debts within the meaning of this statute? I have not before had the opportunity of dealing with this question, and have never intimated an acquiescence in the opinion which is commonly said to prevail. It is a question which I ought to entertain with much caution; because, in deciding one way, I should, as I conceive, contradict the principles on which the law of this court has hitherto stood, and stultify our own practice as it has prevailed for thirty years. Some are satisfied with this truism, that the debts of an insolvency are not absolutely extinguished, but exist until paid; and declare, as a necessary consequence, that they are to be reckoned in the total whose amount regulates the competency to petition. I must decline so rapid a conclusion. Words are to be construed with regard to the subject-matter in which they are employed. The subject-matter is this,—a man surrenders all his estate and effects, present and future, for payment of his debts; he desires to have protection against process for his debts; and the owners of the debts are to share in the property which shall be obtained as the result of his petition. It seems reasonable that in all these propositions "debts" should mean the same thing. The words of the act are, "a person being a trader, but owing debts under 300*l*. may petition." "The petition shall have annexed to it a full and true schedule of debts, with names, and dates of contracting the debts severally, the nature of the debts, and the security."

Surely the debts which he owes for the purposes of this act, are those in respect of which he seeks an advantage to himself by the protection of his person on the one hand, and in respect of which his creditors are to have the benefit of his estate on the other hand. By these tests let the question be tried. The first test is easily disposed of. The petitioner is no petitioner as to the debts of the past insolvency. His protection as to them was pronounced long ago; he does not seek to alter the terms of it. The latter test gives the one topic to be discussed. Is the property that shall be obtained under a new insolvency distributable only among the creditors as to whom protection is sought, or also among creditors under prior insolvencies, as to whom protection is not sought? The argument must be the same as if the party were again petitioning under the old Insolvent Act. The creditor's right of suit under either scheme depends on the position in which he and his debtor stood before this new insolvency took place; that is to say, on the relation which was established between them for the time to come when the latter received the benefit of a discharge. There is no provision in the new laws which professes to alter their relative rights and liabilities. The definition of a petitioner "trader owing debts under 300*l.*" cannot be held to impart to the creditors of a former insolvency new powers over property present or future; and the question of letting them into proof and dividend is the same as if that definition had not been expressed. Thus the point to be discussed resolves itself into a question which has been constantly before us ever since this court was constituted, and which has received one uniform decision. The former creditors have never been inserted in a schedule, neither individually nor in a mass. They have never received notice; never been admitted to oppose; never allowed to prove or receive a dividend. So much has the contrary prevailed, that, even when such parties have obtained from the debtor fresh securities, they have been rejected, and told that they and their claims belonged to a former and a different insolvency. When the law (as was the case ten years ago) required the consent of a certain number of creditors for a man to petition a second time within five years, the creditors of a former insolvency had no voice in the question. If such creditors are to be admitted now, then in a prison case their debts must be included in the warrant of attorney: this will contradict the 90th section of the act, which denies effect to all judgments excepting that which they have already got. In a protection case, they will share in taking a vested interest in all future estate; which, by enlarging, contradicts the terms in which the former insolvency placed them. Either result appears perverse. If we were required thus to blend all the insolvencies of a very insolvent life, it would be necessary to particularise all the debts of all in the last schedule. Each creditor is entitled to know all his competitors. He knows little by reading the provisional assignee's name, with a lumping security for claims that have never been sifted. Moreover, the act

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itself requires "a full schedule with names, and dates of contracting the debts severally, with securities." If not particularised, how can they be challenged? Those whose practice I think to have been erroneous, never proposed that an assignee should prove for the whole body: nor was it ever done. Each had to come for himself. This appears in one case to have raised the question, whether any such old claim could be repelled by the Statute of Limitations: and here it occurs to me to say that, if to such a claim a man could desire to plead that statute, he would not be allowed to do so; but the reason would be this, that a creditor cannot be under a penalty for neglecting to sue, when the law has prohibited him from suing. The debtor in such a case, needs no such plea, he has a higher ground of defence: whether six years or only three have elapsed, he cannot be sued. The statute has in terms disabled the creditor from all suit, "except on the judgment entered up by order of this court;" and most especially disentitles him from coming forward against the debtor in any new state of insolvency. It is quite certain that none of those whom we here speak of as old creditors can compel a new insolvency. In order to do this, a man must be a detaining creditor; and the old one cannot become a detaining creditor. The same thing prevents him from driving the debtor to seek protection under the new laws: he has it already against such parties. The debt, we know, is not extinguished for all intents and purposes: but the power of proceeding for the recovery of it is extinguished, excepting upon the judgment in the several ways prescribed by the statute. Those peculiar methods of seeking payment remain open to him; but the statute limits the employment, even of those, to the case of the debtor coming into a solvent state. The most important and definitive feature which marks the future relation between a discharged insolvent and his creditor is, that the special jurisdiction contrived by the statute for making after-acquired property available, is only to be exercised "if it shall appear that the debtor is of ability to pay." This condition attaches to the exercise of all future proceedings in favour of creditors, under the 87th, 88th, and 89th sections of the act. There can be no suit except upon the judgment; therefore, no suit whatever by individuals; for suit upon the judgment is on behalf of all together. The first of these clauses provides execution on the judgment. The next constrains him, when possessed of property not subject to execution, to transfer so much as the court shall direct, "towards satisfaction of the judgment." The third compels those who hold money, &c. belonging to him, to deliver it, "for the benefit of the creditors entitled to claim under the judgment." These are but different modes of satisfying the judgment; all subject to the scrutiny of the court into the debtor's "ability to pay." These words have always appeared to me of essential import in defining the state of debtor and creditor after an insolvency. But I do not perceive that these words have ever been noticed by those whose arguments and decisions are reported for us. There is the leading

case in matters of bankruptcy, where the judge quotes at length every clause in the act which can be brought upon such a question, excepting only those words which disclose and illustrate the whole principle of the subject. Some of the earlier acts not only express this principle, but define the meaning of it. By the 14th section of 53 Geo. 3, c. 102, "If the insolvent shall become able to pay all or part of his debts, after a reasonable allowance for the maintenance of him and his family, and payment of his debts contracted since his discharge, the creditors may apply for leave to proceed against him; and in case it shall appear to the satisfaction of the court that he is of ability to pay, it shall be lawful for the court to revoke the discharge, or to permit execution to be taken out on the judgment." The present act exhibits the same contingency, "if it shall appear that he is of ability to pay;" the meaning of which,—namely, ability after payment of new debts—has been recognised by the court ever since I belonged to it, now twenty-four years. We constantly have inquiries into the truth of new debts, when alleged in resistance of a claim made to our discretion upon fresh property. It is plain that if a man becomes wealthy, not having new creditors, the old ones can never deal with his substance by bringing on a process of insolvency. They must resort to the special jurisdiction of this court under the insolvency to which they belong. Why, then, should the accident of his having a new creditor who can arrest give them introduction to that process? The new creditors may enforce payment through that process. The old ones must follow the provisions of the statute in their pursuit of the surplus. There is indeed in the opposite doctrine this enormous absurdity:—if a man has new creditors, and just property enough to pay them in full, the court, while none of these arrest, can by no means whatever interfere with his property in favour of the old list, because the condition of helping them is wanting—he is not more than solvent. If, however, he has enough only to pay the new ones half-a-crown in the pound, and one of them shall arrest and petition, then, according to that theory, the old ones may rush in and set the condition—ability to pay—at defiance; actually resting their claim on his inability to pay either one set of creditors or the other. Can any man study the Insolvent Acts from that of 1813 to the present day, and not discern the policy of these laws? It is, that a man shall be able to earn himself a livelihood, not harassed for his debts; that his struggle for subsistence shall not be frustrated by the invasion of his means of subsistence; that his past debts shall only be a charge on the contingency of a clear surplus estate. This policy is set at naught if the old creditors can, by finding one new man to arrest, procure a second insolvency for their own benefit. The further removed a man shall be from a state of surplus, the surer will be the scheme of oppression, in the facility of finding the instrument of oppression. Such a state of things is warranted by no words in any statute, and is prohibited by the whole tenor and principle of the laws which this court is required to administer.

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It remains that I should notice the grounds on which a contrary opinion seems to be founded. It is known that the scheduled creditors of a discharged insolvent have been permitted by the Court of Bankruptcy to prove under a subsequent fiat. I admit that there is analogy. But if my observations have been just; if the laws of this court limit the faculty of claiming payment to the predicament of a clear surplus estate, this court is to respect the law, notwithstanding the practice of another court of similar character. But more is to be said. The admission of such proofs in bankruptcy has been introduced on the supposed authority of one single common-law decision: (*Jellis v. Mountford*, 4 Barn. & Ald. 256.) I dispute the application of that authority. The question in that case was upon a prior bankruptcy, not a subsequent one. One Routledge had become bankrupt, that is, had committed an act of bankruptcy before he passed through this court; and the question was, whether, after he had gone through this court, it was too late to prove that bankruptcy: whether a creditor named in the schedule was not barred from bringing forward his debt as a foundation of the bankruptcy? It was decided that he might petition on that debt. In that instance there would of course be no difficulty on the proof of debts: for the bankruptcy, once established, took all the funds by priority; and creditors could not be deprived of their right against the funds by the discharge of the debtor under an insolvency which was in law posterior to the bankruptcy. This is the case, which has been made the excuse for permitting proof of such a debt in a new bankruptcy twenty years afterwards; for holding that a creditor, having received his share of assets under an insolvency, may at any distance of time share in the new assets of a new insolvency. I have explained my reasons for thinking that such a position violates the principles and enactments of the insolvent law: but let us suppose those principles brought to the notice of higher tribunals, which I am not aware that they ever have been, would this case be allowed to subvert them? I think not. In applying the decision of a court as a precedent, we must look to the case which was before the court, and not merely make a handle of particular expressions, avoiding to notice the facts to which they were applied. In that case there was a competition between a bankruptcy and an insolvency for the title to a failing man's estate, and the point was decided in favour of the former. The result was that the proceedings in this court, excepting only the award of personal liberty, became void. As to debts and property, present and future, our jurisdiction was utterly superseded. In pronouncing the decision, which was clearly right on grounds of commercial policy, the court expresses that most unquestionable proposition that the debt was not extinguished; and they sanction the use of it to a most legitimate purpose—the purpose of enabling the creditor to charge his debtor with an act of bankruptcy that shall overreach the title under the insolvency. The misapplication of this case as a precedent consists in an extravagant value given to the proposition,

that a scheduled debt is not extinguished to all intents and purposes. It is not, therefore, alive and available to all intents and purposes. It seems to me that the case ceases to be a precedent when you want to use such a debt for a totally different purpose from that for which it was permitted to be used there. Observe, then, in that case there was no succession of insolvencies or bankruptcies, as in the question now before us. There was no newly-acquired property, as there is here; there was one state of insolvency, and the contest was, by which tribunal the affairs should be administered. In short, it was a question of priority; or rather, of the right to prove priority and the means of proving it. The Chief Justice says, "It may be important for creditors that a commission should issue: the assignee has a more extensive power of recovering the assets." Mr. Justice Bayley says, "We must recollect that the discharge has no operation as against creditors not named in the schedule. Any of these creditors therefore might lawfully sue out a commission; and then the same effect would take place, and all the property of the insolvent would vest in the assignees appointed under that commission. Now, to prevent this inconvenience, which would be still greater than those suggested, it seems to me that the creditors named in the schedule ought to have the power of suing out a commission; for they cannot be sure that the creditors not named may not afterwards make their whole proceedings void. Besides, their remedy under the bankrupt laws is much more extensive than under the Insolvent Act: here, the payment of money to the defendant was void under the bankrupt laws; and the petitioning creditor, finding that he cannot set it aside under the Insolvent Act, has obtained a commission, and is seeking to distribute the proceeds among all the creditors of the bankrupt." Is the learned judge here talking with a view to future trading and future acts of bankruptcy? Certainly not; for against them the title in this court was safe. He speaks on the subject before him, a commission that may overreach the insolvency, and, as he expresses it, make the whole proceedings void—his point is, that the creditors should not lose their option of the stronger title. It has always been a blemish in the law that creditors cannot more readily compel an insolvent trader to a bankruptcy; and I apprehend that the courts have been inclined to aid rather than impede them in their resort to this process against the trader's estate. It was not expedient that his own act of petitioning this court should disable them from proceeding in bankruptcy, on their discovering that he had committed an act which would overreach the title of our assignee, and place the funds in the other court. *Jellis v. Mountford* was decided in favour of that principle in 1821; and by the Insolvent Act of 1824 creditors were relieved from all difficulty on the subject, by a provision that the very act of petitioning should itself be an act of bankruptcy. When I framed the act which was passed in 1826, I found there was great injustice in this; for the assignee of a man subject to the bankrupt laws could never know whether his title was safe, as the very fact on which it

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rested could any day be brought forward in support of a commission to overthrow it. I represented this to Lord Eldon, who was sufficiently jealous on behalf of the bankruptcy jurisdiction, and on behalf of its presiding deity, the Lord Chancellor. But his admirable sense of justice sanctioned the alteration which I required, and the result was that provision which now stands the 39th clause of the present act. It is a Statute of Limitations, providing that the title in this court shall not be avoided by a bankruptcy, unless the bankruptcy be adjudicated before the gazetted day of hearing, or within two calendar months from the vesting order; and this limitation holds good, however early may be the act of bankruptcy which can be proved, and whether the debt for supporting the fiat was duly scheduled or omitted. It is true that, in *Ex parte Garnett* (1 De Gex, 98), a recent case, the Chief Judge of the Court of Review spoke of the validity of our assignee's title as a matter undecided, in a case where the fiat was nearly eleven months after the vesting order, and nine and a half after the adjudication; adding, that he declined to give any opinion whether the assignees under the bankruptcy were entitled to recover property from the assignee under the Insolvent Debtors' Court. No reasons were given for thinking the words of the statute to be ambiguous, and I abide by my opinion that they are perfectly clear. I feel assured that neither Lord Eldon, in assenting to this enactment, nor the judges of the King's Bench, in deciding *Jellis v. Mountford*, had any notion of dealing with a case such as is argued now, the debts of an old insolvency interfering with new assets in a new insolvency. Notwithstanding some remarks that are questionable, and others that are superfluous, I feel confident both that the decision was a sound and wise one, and that it is quite inapplicable to the case now before us. In showing that this case is no precedent for our guidance, I sufficiently excuse myself from imitating the practice in bankruptcy which professes to be founded upon it. But as two cases upon that practice have been reported, I will advert to them. In *Ex parte Barrington* (2 M. & Ayr. 255), which was before the Commissioners of the Great Seal in 1835, it was held that such a debt as we speak of may support a fiat; and in *Ex parte Fenwick*, fourteen months afterwards, this was followed by the Court of Review. In the former case, the court took time to consider the judgment; so that one may expect to find whatever strength of argument the subject admits of. Lord Commissioner Shadwell begins with saying, "The question is, whether this fiat be good, the petitioning creditor being inserted in the schedule in the Insolvent Debtors' Court. It is insisted that, his name and debt being therein, the debt is gone and destroyed for all purposes." Now I must be excused for saying that I do not find any such monstrous proposition put forward by counsel in that case, or any other that I have seen; and yet nearly the whole of these judgments are employed in combating this imagined proposition. The learned judge, who quotes at length many clauses of the statute, proceeds to repeat

that "the Legislature has not in positive terms declared the debt extinct for all purposes." After quoting the 57th section, excepting only the very important words, "if it shall appear that he is of ability to pay," his lordship observes, "This clause clearly shows that the debts still exist in contemplation of the Legislature." There is then this comment on the 91st section: "It appears to me that this section applies only to legal proceedings; for, though the word 'suit' might apply to a suit in equity, yet at law the proceeding is denominated a suit. Moreover, this section speaks of 'reply,' which expression is inapplicable to a suit in equity." The judgment then reverts to the main topic, saying, "Even if this section did apply to suits in equity, the language of the whole act proves that no intent to discharge from a debt existed." Lord Commissioner Bosanquet speaks to the same effect, excepting that he does not declare proof in bankruptcy to be a suit in equity. He inquires only whether the debt was utterly dead and gone, saying, "The question is, whether the act discharges the debt. Is the discharge complete in all respects, or qualified? If the act intended to discharge from the debt, it is very badly worded. If the act intended completely to discharge the debt, it would have been easy to have done so, and there is nothing to enable a court to draw an inference the other way." The leading doctrine, thus laboured, is, that the debt is not absolutely extinct. No one ever yet thought or said that it was. The idea is suggested only by those who combat it. The most superficial notice of the statute shows that the debt is not extinct. What then? a debt may be extinct for one purpose, and not extinct for another. The debt of one who has his debtor in execution is extinct for some purposes. He cannot sue him again, and he cannot have execution against his property; accordingly, he cannot institute a bankruptcy which is both a suit and an execution. But his debt is not extinguished to all purposes. If another man has instituted a bankruptcy, he may release the debtor, and prove the debt. Also, if the debtor die in custody, the right of execution against land and goods is revived. Let us not then be told that the debt, because not absolutely extinct, can share in the scramble under successive insolvencies; and that a court of law is not to consider in any case the principle which should admit it or exclude it. Such indifference to principle does not characterise the decisions on matters of bankruptcy. Observe the cases in which the courts have refused to give effect to a second commission where the party is uncertificated in the first; or to a third, where he has not paid 15s. in the second. In those cases judges might have said, "a debt is a debt; a trading is a trading; and an act of bankruptcy is an act of bankruptcy; and we, sitting in a court of law, must pronounce the commission to be valid." They have not so reasoned; they have embraced views of public policy, and declared the nullity of assignments where there can be nothing to assign. This doctrine is sanctioned by a long series of decisions of Lord Eldon, Lord Tenterden, Sir Nicholas Tindal, and other eminent judges; and, though the words

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in which it has sometimes been laid down, were disapproved in *Ex parte Welsh* (Mont. R. 276), as importing a limit to the power of the great seal, and though the principle itself has been somewhat questioned by two able judges, in *Summers v. Jones* (3 Mont. & A. 400), the decisions are still standing; and I see them well sustained by Mr. Commissioner Holroyd, in *Ex parte Chambers* (3 Mont. & A. 294.) They are only alluded to now, for vindicating, in the consideration of such questions, a regard to principles and policy. In the second case, *Ex parte Fenwick* (2 Mont. & Ayrt. 681), I find one remark that is not in the other case; namely, that "the case of a discharge under insolvency resembles a trust-deed of composition without a release, where a subsequent fiat issues." Surely, there is the greatest dissimilarity. After such a deed, there are covenanted instalments, the full payment of which is frustrated by the bankruptcy; something therefore is claimable under the bankruptcy. No such payment can be in progress after an insolvency; all expectation of payment is gone, save on a contingency, which by the bankruptcy becomes more incapable of proof than it was before. While the operation of the discharge by this court thus prohibits proof in bankruptcy, the Statute of Bankruptcy itself seems to repudiate such a proof. By the 46th section, proof may be made by a creditor. "Creditor" means a man armed with ordinary legal rights: none such rights belong to the old creditor we speak of. By the 51st section, another sort of person may prove; one who has given credit to the bankrupt for something payable at a future time. No such credit exists in the case we speak of; for the indefinite delay of payment is not credit, but the act of the law, and no future time is ascertainable. By the 56th section, another sort of person may prove—one whose debt is payable on a contingency. There is, indeed, a contingency on which the claims we speak of may be brought forward; but it is a contingency incapable of valuation, and therefore incapable of proof—the contingency of solvency and surplus. Moreover, it can never arise so long as a certificate is worth asking for. I can imagine that one who admits the strength of what has been urged on the words and principle of the insolvent law, may still be perplexed with a seeming difficulty, and argue thus:—"If the bankrupt shall get his certificate, it will bar all debts, and among them the old insolvency debts, operating as a satisfaction of the judgment; therefore the old debts must be proveable." I would answer by saying, "We do not reason from certificate to proof, but from proof to certificate. If I show that such a debt is not to be proved, it follows that the certificate has no effect upon it." Look, however, again to the act, and study the certificate clauses. The extent of the privilege gained to a man by that instrument will appear by the provisions made for his availing himself of it. By the 42nd clause of the last Bankrupt Act, "if he shall be arrested, or have any action brought against him for any debt, claim, or demand hereby made proveable under the commission, he shall be discharged upon entering an appearance, and may plead

that the cause of action accrued before he became bankrupt." The discharged insolvent is a man who needs not a certificate to shield him against arrest or action for a debt scheduled in this court. Again: "If he shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before certificate, a judge shall order him to be discharged." The debt of an old insolvency is no object of this privilege: the bankrupt was safe against execution before the certificate existed, or the bankruptcy either. For all these reasons I cannot help thinking that the Courts of Bankruptcy have been wrong in admitting old insolvency creditors to a dividend. The question has not arisen in a superior court of law. It might arise, if the Court of Queen's Bench were asked, on the ground of a certificate, to prohibit this court from exercising its powers over a surplus estate acquired by a party after his bankruptcy. The question would be a new one in that court: so, perhaps, would be the assertion of the obvious principles of the insolvent law made by Mr. Cooke in this argument,—principles which have long been familiar to my apprehension, and cherished for the sound justice in which they are founded. My conjecture is, that the Court of Queen's Bench would recognize those principles: that they would hold the old debt not proveable; and that the contingent interest left to the creditor, by the insolvency, the right to ask the aid of this court in the event of the debtor owning some day a surplus estate, is an interest not capable of proof; and that, if ever such predicament shall be attained, the peculiar powers which the law reserved to this court at the insolvency will survive, notwithstanding any number of bankruptcies and certificates that may have intervened. There is one other point alluded to in the cases; namely, that payment of a scheduled debt may be sought in bankruptcy, because this process is not by name prohibited. It appears to me that all individual suit whatever is prohibited. Besides the plain policy of the act, and the defining of the debtor's future liability, the words of the 91st section, justly construed, are ample for the purpose. The words are "any suit except upon the judgment." What is suit upon the judgment? It is the execution or other process which this court may permit against a state of solvency, and the petitions and applications made to this court for sanctioning such process. This is itself a liberal use of the word "suit;" and the one clearly expressed exception takes away all doubt from the extent of the thing spoken of, the suits which are prohibited. All is prohibited, except upon the judgment under the control of this court. There is high authority that favours us in claiming the most liberal interpretation to the words of the 91st section, which protect the discharged insolvent from the aggression of individual creditors. Lord Mansfield had held that the Statute of Limitations did not prevent a creditor from taking out a commission of bankruptcy, as it extended only to the remedies by action mentioned in the statute, not extinguishing the debt, nor taking away other remedy: (*Fowler v. Brown*, 1 Cooke's B. L. 13.) This was

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overruled by Lord Eldon. He gave a larger and more liberal interpretation, saying, in his admirable and most deliberate judgment in *Ex parte Dewdney* (15 Ves. 447), "A commission of bankruptcy is nothing more than a substitution of the authority of the Lord Chancellor, enabling him to work out the payment of those creditors, who could by legal action or equitable suit have compelled payment; and the objection upon the Statute of Limitations may be sustained." Now when we inquire in either statute what proceedings are excluded, the words of the Insolvent Act are far more comprehensive than those of the act called the Statute of Limitations. Every limitation in the 21 Jac. 1, c. 16, is applied in terms to some particular sorts of action, and to those only: there are no general words whatever. And yet the principle of that act has been ruled to extend to proof in bankruptcy, and to proceedings in equity; both unmentioned in the act. Much stronger are the grounds for construing liberally restriction of suit in the Insolvent Act. There is the large general expression "any suit," strengthened by one most pointed exception—the expression which excludes other exceptions. That which is excepted is the proceeding upon and in aid of the judgment; and the policy of the provision becomes still clearer when we see such proceeding limited to the case of ability to pay. The one case in equity, quoted at the bar, is in the strongest confirmation of the principle by which I abide. Those courts maintain their right of dealing with assets for the scheduled creditors of deceased persons, who have at any time obtained the benefit of an Insolvent Act. But those courts aid them only with that estate which shall survive the payment of later creditors. This principle is derived from the Insolvent Act: it is declared to be so, and cannot be traced to any other source. In *Barton v. Tattersall* (1 Rus. & Myl. 237), Sir John Leach decided, where a party had in his lifetime gone through two insolvencies, that the new debts which had never been in this court, must be first paid; that the debts of the second insolvency must be paid next; and those of the first insolvency paid last. And why last? Because, by the relation established between debtor and creditor by that first insolvency, they could only share in future property, when it should present a surplus after satisfying new debts. I think that I am supported by the words of the written law, by the worthiest portion of precedents, and by the whole weight of principle, in saying that the old creditors cannot be admitted to share under a new insolvency of their debtor at an after period of his life.

The objection that the debts in the old schedules were not inserted in the schedules filed with the present petitions having been thus overruled by the Learned Commissioner, the case of Roby was disposed of.

Petitions sustained upon this point.

INSOLVENT DEBTORS' COURT.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection Case.**February 20, 1849.**Re HENRY DAVISON.**Trader debtor—Amount of liabilities.*

All debts must be reckoned in the amount of a trader's liabilities, although the petitioner may expect that a particular creditor will not press for the payment of his debts.

THE trustees for the wife of the insolvent advanced her two sums, amounting together to 270*l.*, for which they took insolvent's two promissory notes. Insolvent filed his petition on 12th December last, as a trader, but omitted to insert this debt, alleging that he was not to be pressed for the money. To day one of the trustees proved that he held the notes until within a few days of the present time, when the notes were taken up by the wife's mother, who made no claim against the insolvent, but the latter considered the trustees to be his creditors until the mother interposed.

Dowse submitted that the petition must be dismissed. At the time of filing it the insolvent was indebted to the trustees, and consequently his debts then amounted to near 400*l.*

CHIEF COMMISSIONER.—The objection is fatal.

INSOLVENT DEBTORS' COURT.

(Before Mr. COMMISSIONER LAW.)

*Protection Case.**April 9, 1850.**Re AUGUSTUS PATEY.**Rescinding adjudication—Satisfaction of opposing creditor.*

No day having been named for a final order, but permission being given to the insolvent to apply at the expiration of six months, the Court will not alter its judgment, although the opposing creditor should be paid and the opposition withdrawn.

THIS insolvent appeared for his interim order in January, when, being opposed by a creditor, no day was named for his final order, but the Learned Commissioner intimated that he might apply again at the end of six months. Within that period the debt of the opposing creditor was paid, and to-day

Macrae, for the insolvent, applied under the 28th section for a protecting order, upon an affidavit from the creditor that his claim had been satisfied and his opposition withdrawn.

Mr. Commissioner LAW observed that it did not appear from what source he had been paid. It might have been money that should have gone to the creditors. He declined to interfere, without going into all the circumstances of the case, and trying the case again. At present he saw no reason for disturbing the adjudication of the Court. He might apply at the end of six months from the date of his hearing.

Application refused.

INSOLVENT DEBTORS' COURT.

May 27, 1850.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Re JOHN LEWES.**Proof of debt—Statute of Limitations.*

A creditor omitted from the schedule may be admitted to prove upon notice of dividend.
The Statute of Limitations nor any lapse of time will affect such creditor's right to prove against the estate of an insolvent.

NICHOLS had obtained a rule upon a former day (April 23), for the assignees of the insolvent to show cause why John Roblin, administrator of George Roblin, should not be admitted a creditor on the schedule, he never having been inserted. To-day, *Sargood*, for the assignees, showed cause. The debt was not disputed. The only question was, whether the Statute of Limitations operated to bar a debt which should have been inserted in the insolvent's schedule when he took the benefit of the act five-and-twenty years ago, in March, 1825, so as to prevent the creditor or his representatives from coming in upon the declaration of a dividend and sharing in the assets of the estate which had been got in by putting in force the machinery of the statute applicable to future-acquired property.

Nichols said that a relation of the insolvent's wife died intestate, and in that way he became entitled to a very large property. Upon the application of the assignees, Mr. Commissioner Harris had made an order that a sum of 3,000*l.* should be paid into court for the benefit of the creditors, but the wife dying, it was found that the order could not be enforced. Letters of administration *de bonis non*, were then granted, and upon the administration of the estate and effects of the deceased, Mr. Commissioner Harris subsequently made an order for the payment of 2,000*l.* into court, which order having been complied with, a dividend was declared, upon which the present claim to prove was preferred. The officer of the court thought that the representative of the deceased creditor could not prove without the permission of the court, the debt being barred by the Statute of Limitations. Upon a re-hearing, the court would have ordered the creditor to be inserted, and the insolvent himself could not be heard in his own wrong.

*Re JOHN
LEWES.*

Proof of debt.

The CHIEF COMMISSIONER.—This is an objection which could not be made by the insolvent, except in his own wrong. It is but just, however, that the claimant should come in if he was a debtor, and that the debt existed was not doubted. The creditor should not suffer by the insolvent's laches.

Rule absolute for the creditor to come in. Assignees' costs of appearing to the rule allowed.

NOTE.—Under the Act 7 Geo. 4, c. 57, s. 10, and the 1 & 2 Vict. c. 110, s. 35, it has been held that creditors of an insolvent at the time his petition for discharge is filed, were entitled, on taking the proper steps for the purpose, to participate in his estate, whether they have been inserted in the schedule or not.

Borell v. Darn (2 Hare, 440). One of the arguments advanced at the bar in this case on behalf of the plaintiff (who was discharged as an insolvent under the 7 Geo. 4, c. 57, s. 10, in January, 1838) was, that no creditor could claim an interest in the estate of the insolvent, unless his name were in the schedule; but the Vice-Chancellor said, "In order to satisfy myself on this subject, I have carefully considered the act of Parliament, and the impression upon my mind is so strong, that the creditors not named by the insolvent in his schedule might entitle themselves to have their names and debts added to the schedule, and procure them to be so, that I cannot hold that the assignees were wrong. . . . I cannot discover the foundation for the arguments of the plaintiff's counsel, that no creditors of the insolvent, at the time of filing his petition, have an interest in his estate under the insolvency, unless the insolvent has volunteered to put their names upon his schedule."

INSOLVENT DEBTORS' COURT.

May 14, 1850.

(Before the CHIEF COMMISSIONER REYNOLDS.)

Protection Case.

Re JOHN DYER WILLIAMS.

Petition—Description.

If all the names in which an insolvent has contracted debts be not set forth in his petition, it will be dismissed.

THIS insolvent had accepted bills in the name of J. Williams, his name being John Dyer Williams.

Hughes objected that the omission to describe himself as of the name of J. Williams in his petition was fatal.

Dowse, for the insolvent, said he had petitioned in his right name, and fully complied with the marginal directions in the petition.

The COURT intimated that the objection was fatal.

Petition dismissed.

INSOLVENT DEBTORS' COURT.

November 22, 1847.

(Before Mr. COMMISSIONER PHILLIPS.)

*Protection Case.**Re JACOB HURREN.**Trader-debtor—Amount of debts.*

Debts included in schedules under the Protection Statutes must be included in estimating the amount of a trader-debtor's liabilities upon subsequent applications to the court under these statutes, and if together they exceed the statutable limit, the petition will be dismissed.

THIS insolvent, a tea-dealer, had petitioned the court under the Protection Statutes, and now appeared for his examination, in the course of which the court discovered that he had previously petitioned the Court of Bankruptcy under the same statutes, and that the debts in his old schedule, together with those under his present insolvency, exceeded 300*l.*

The petition was dismissed.

INSOLVENT DEBTORS' COURT.

May 1, 1850.

(Before the CHIEF COMMISSIONER REYNOLDS.)

*Protection Case.**Re EDWARD SORRELL.**Accommodation bills.*

An insolvent, accepting accommodation bills, when unable to meet his own engagements, ordinarily contracts a debt without reasonable expectations of payment.

THIS insolvent had accepted an accommodation bill when he could not pay his own debts.

The CHIEF COMMISSIONER.—I shall name no day for granting a final order. I shall stop this system of accepting accommodation bills by every means in my power.

No day named.

INSOLVENT DEBTORS' COURT.

May 14, 1850.

(Before the CHIEF COMMISSIONER REYNOLDS.

Protection Case.

Re JAMES WILSON.

Blanks in petition—Disposal of property.

The omission to fill up the blank left in the petition for stating the sum paid to the attorney is fatal.
Parting with property on the eve of petitioning, which is unaccounted for in the schedule, is also fatal.

THIS insolvent was examined by counsel for an opposing creditor, after which

The CHIEF COMMISSIONER said.—This insolvent, on the eve of petitioning the court, disposed of property for 24*l.* He paid his attorney 5*l.* out of that money, but neither fact is stated in the schedule.

Petition dismissed.

INSOLVENT DEBTORS' COURT.

July 20, 1848.

(Before Mr. COMMISSIONER LAW.)

*Protection Case.**Re JAMES HENRY HANCE.**Second petition—Jurisdiction.*

Held, that the effect of granting a protecting and a final order to a petitioner, under the statutes 5 & 6 Vict. c. 116, 7 & 8 Vict. c. 96, is to place him, with respect to property, in the same condition as an uncertificated bankrupt.

Held, also, that as a fiat against an uncertificated bankrupt is invalid, and as the Protection Statutes are to be construed by analogy to the law of bankruptcy, except where otherwise expressed, a second protection and final order would be void in law if granted, and that, consequently, second petitions under these acts will not be received.

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THIS insolvent appeared upon an adjourned interim order, when it appearing that after having been twice bankrupt, and three times discharged by the court from a large amount of liabilities, he, in July 1845, petitioned the Court of Bankruptcy under the Protection Acts, the learned Commissioner objected that he was in the position of an uncertificated bankrupt, against whom a second commission is a nullity and void in law. The statute was silent upon the point, but the 73rd section of 7 & 8 Vict. c. 96, directed that the provisions of the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, "should be construed by analogy to the law of bankruptcy, except where otherwise therein respectively expressed." His impression was, that as the courts of law would not recognize or give effect to a certificate granted under a second bankruptcy to an uncertificated bankrupt, so neither, upon the same principle, would they give validity to a protection granted under similar circumstances. This opinion having been expressed by the learned commissioner, when the facts were first brought under his notice, an application was made for leave to apply to the Court of Bankruptcy for the dismissal of the prior petition. This course being assented to, the application was made, and proving unsuccessful, the matter came again before the court to-day for argument.

Cooke, for the petitioner, said, that although the petitioner had formerly petitioned the Court of Bankruptcy under the Protection Statutes, he was never heard, for having been subpoenaed as witness at a trial, he was not able to attend upon the day appointed for his first examination, and the case was struck out.

Re JAMES HENRY HANCE. Mr. COMMISSIONER LAW.—But there is no question that the property remains vested there.

Second petition—Jurisdiction. Cooke said that he had not obtained his final order, and had no benefit whatever from the act, for one of his creditors hostilely sued him, and he applied here, and obtained the usual adjudication, protecting him from process in respect of all his debts, including those in bankruptcy. Therefore his person was free from all these obligations. The court entertained his petition here, and discharged him; therefore, so far as his person was concerned, it was the same as if he had obtained his certificate. He had now petitioned this court under the 7 & 8 Vict. c. 96, and his Honour had started objections, that he could have no benefit here, because he had formerly applied to the Court of Bankruptcy under the 5 & 6 Vict. c. 116. It was not the case of an original petition under the Protection Statute, from which benefit had followed to the insolvent, but it was the case of an unperfected proceeding under the 5 & 6 Vict. c. 116, modified by a subsequent discharge under the Prison Statutes.

Mr. COMMISSIONER LAW.—So far as I see, you may deal with it in the same manner as if he had obtained his final order in the Court of Bankruptcy.

Cooke.—Then, *cadit questio*, he would stand in the same position as an uncertificated bankrupt. Under the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96, an impression has prevailed amongst many persons, that, notwithstanding the final order, the assignees would be entitled to seize property, because there was some provision to that effect. But however that might be, the question now to be considered was narrowed to this, whether a fiat against a man incapable of property was good, and if not, whether, by analogy, a proceeding under the Protection Statutes, by a petitioner not capable of property, was not equally invalid? With respect to the first question, whether a fiat against an uncertificated bankrupt was good,—it never was an objection to a fiat, that a man had no property, and, by parity of reasoning, that there should be none here. There had been fiats where no property was possessed, and that met the objection here. There were fiats issued and sustained upon the possibility of property.

Mr. COMMISSIONER LAW.—I believe the decisions are the other way.

Cooke referred to *Ex parte Poulden* (16 Ves. 475); *Ex parte Lees* (16 Ves. jun. 477); and *Ex parte Cridland* (3 Ves. & Bea. 94, and 2 Rose, 164.) The Lord Chancellor, in these cases, had refused to supersede, and supported second commissions. These were very excellent cases in the best part of our legal history, and in the latter case (*Ex parte Cridland*) Lord Eldon observed, “though I could not say upon what principle both commissions could exist together, yet I was bound in many instances not to supersede a second commission on account of a former commission subsisting, which however would not determine the effect of the second if the question arose at law.”

Mr. COMMISSIONER LAW.—But does his lordship say, that a second commission is good in law? Does he not say, that the commission sustained was “obvious to the doctrine that a second commission against an uncertificated bankrupt is an absolute nullity,” and that this, amongst other difficulties attending it, had always pressed his mind extremely. Does he not admit, in various cases, that a second commission is absolutely void at law, and that it would be inoperative at law?

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Cooke.—Notwithstanding these difficulties, these cases would show, as a matter of fact, that the Lord Chancellor had permitted two commissions to subsist at the same time. Lord Hardwicke had done the same. There were no men of higher character in English law than Lord Eldon and Lord Hardwicke; and either from expediency or some other cause, they had permitted two commissions to subsist at the same time. He submitted that he should follow the example of these eminent lawyers. It was important also to observe, that there were cases in which, although a man was uncertificated under a first bankruptcy, a second certificate under a second bankruptcy was held good: (*Ex parte Thompson*, 1 Rose, 285.) It was important to show that two commissions could exist at the same time. In *Ex parte Welsh*, August, 1831 (Montague's Cases in Bankruptcy, p. 276), the Lord Chancellor refused to supersede the second commission, observing, “That it was clear that cases might exist in which the debtor may have property to be divided under a third commission, as for instance, there may be a reversion, and which falling in the whole of the debts under the second commission, may be paid, and as there would be assets with a surplus, the third commission might operate. The 127th section of 6 Geo. 4, c. 16, provides for the vesting of property, except the household furniture, &c. Under this clause the bankrupt's household furniture was not liable to be seized by the assignees under a second commission, but it was clearly property upon which the fiat might attach.” Upon these grounds, his lordship supposes that a second fiat might be supported, and he expressly stated that he differed with the judges of the King's Bench in *Till v. Wilson*. That was important to show that two commissions could exist at the same time. In the case of *Till v. Wilson* (7 Barn. & Cress. 685, 1828), Mr. Baron Parke, then at the bar, observed, “There are undoubtedly several *dicta* in the reports of cases in the Courts of Equity, that a second commission taken out against a party who has not obtained his certificate under the first is void. But it will be found that most of them are founded upon the authority of Lord Hardwicke, who, in the case of *Ex parte Proudfoot* (1 Atk. 253), said that a second commission was void at law. The ground was that the bankrupt's property was vested in his first assignees, and there was nothing for the second commission to work upon, but when that case was decided, it was considered that an uncertificated bankrupt could in no case acquire any property. It has since, however, been fully settled that he has a special property in goods acquired by himself after bank-

Re JAMES HENRY HANCE. *Webb v. Fox* (7 T. R. 391.) The opinion of Lord Hardwicke may therefore have proceeded upon a wrong impression as to the law in this respect. At all events, an uncertificated bankrupt has some property that would pass to his assignees under a second commission, for he has an equitable interest in the surplus of his effects administered under the first commission, which remains after payment of his debts. A second commission may therefore issue, and be supported at law, at least until it is avoided by a *supersedeas*." That was the opinion of one eminent lawyer, and there were numerous *dicta* to the same effect.

Mr. COMMISSIONER LAW.—What case is that which is referred to as proving that an uncertificated bankrupt may maintain trover?

Cooke.—In *Webb v. Fox*, it was held that an uncertificated bankrupt might maintain trover against a stranger for goods acquired by him after his bankruptcy. There were other decisions to the same effect. The rule is, that an uncertificated bankrupt has a special property against all persons but his assignees, but the assignees not interfering, he may have a qualified right.

Mr. COMMISSIONER LAW.—He may bring trover, but he cannot sue for a debt.

Cooke.—That may be, but Mr. Parke, when arguing upon this point in *Till v. Wilson* (7 B. & C. 684), contends that it was an erroneous impression, that an uncertificated bankrupt could in no case acquire property, and that the law had been set right in some later cases. The next great case was that of *Fowler v. Coster* (10 B. & C. 427), confirming the decision in *Till v. Wilson*. The former case, said Mr. Baron Gurney, was brought to test the validity of the decision in *Till v. Wilson*, which was very much questioned.

Mr. COMMISSIONER LAW.—I shall act upon these cases and others which support the doctrine.

Cooke.—Nevertheless, it has been thought since, by many high authorities, that the law was mistaken. In *Ex parte Welsh* (1 Mont. 276), Lord Brougham observed, in reference to these cases, "whether or no the Great Seal could issue a third commission, was not a question before the judges, and after an attentive consideration of the act of Parliament and the cases, particularly the cases at law, he could not bring his mind to say that the Great Seal had not the power to issue a third commission in these cases, as it was clear that cases might exist in which the debtor may have property to be divided under a third commission; as for instance, there may be a reversion falling in from which the whole of the debts under the second commission might be paid, and as there would be assets with a surplus, the third commission might operate."

Counsel here referred to cases to show that, under certain circumstances, fiats issued against uncertificated bankrupts had not been held to be inoperative even in courts of law.

Cooke—In the very admirable reports of Mr. Scott, there was the case of *Butler v. Hobson*, in the Common Pleas in 1838 (5 Scott, 824), bearing directly on this point. That was an action of trover, and the plaintiff claimed as assignee under a second commission, in which he had obtained his certificate, but his estate had not paid 15s. in the pound, and it was held, that it was competent to the defendant (who claimed as assignee under a subsequent fiat) to show in answer to the plaintiff's claim, that the goods (after-acquired property) had been suffered to remain in the order and disposition of the bankrupt, by the consent and permission of the true owner, and therefore passed to the assignees of the Insolvent Debtors' Court, the bankrupt having taken the benefit of that act. (a) These cases showed that fiats issued frequently in the case of uncertificated bankrupts and that they had been allowed to operate. In *Ex parte Chambers*, 3 Mont. & Ayr. 294 (1837), Mr. Commissioner Holroyd refused to open a fiat against an uncertificated bankrupt, and reviewed all the cases. His judgment is extremely valuable, (b) but the propriety of his decision was objected to by Sir Geo. Rose, who, in *Ex parte Addison* (3 Mont. & Ayr. 438) observed, “An error has got abroad and been acted upon, that when a second fiat issues against an uncertificated bankrupt, a commissioner is not justified in opening it. This idea would do much mischief if it prevailed in practice. The duty of the London Commissioners is to open all fiats directed to them.” He had taken the liberty to ask the learned Commissioners in bankruptcy, and their practice was to open all fiats directed to them. When to this he added that in *Summers v. Jones* (3 Mont. & Ayr. 400) Mr. Baron Parke doubted the law in *Fowler v. Coster*, he submitted that there was so much doubt thrown upon the case that the court might permit the case to go on, especially as no inconvenience could arise there from this conflict of judgments and authorities.

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Mr. COMMISSIONER LAW.—You confine your observations to bankruptcy.

Cooke said he did not think it expedient to urge the point as to whether the petitioner's property was fully vested in bankruptcy.

Mr. COMMISSIONER LAW.—Some cases have been mentioned

(a) See also, *Re Thomas Rawlings* coram Serjt. Stephen, Bristol District Court of Bankruptcy, 2 L. T. 335, and the numerous cases there cited: (*Ex parte Bourne*, 2 G. & J. 137; *Ex parte Welsh*, Mont. 27; *Ex parte Devas*, 4 D. & C. 366; *Ex parte Jungmichael*, 2 M. D. & D. 471; *Ex parte Butler*, ib. 731; *Re Dennis*, 16 L. T. 556.)—REPORTER.

(b) Commissioner Holroyd, in giving judgment, said:—“As to the authority to act under the present fiat, suppose the law that a second fiat against an uncertified bankrupt is void at law arose from an express enactment, to that effect, would a fiat issued under such circumstances give this court, which is both a court of law and equity, and bound to know what the law is, any authority to proceed upon it when the circumstances which make the fiat a nullity are matters of record in this court? Or, suppose a person is proved, before adjudication, to be an infant, the law being that a fiat against an infant is void, and not merely voidable, could this court properly adjudicate against such infant?” . . . “It was argued by Mr. Anderdon that a fiat was a matter of right. I admit that, provided it be against a trader within the meaning of the bankrupt laws.

“The adjudication may be matter of right provided the requisites are proved, but the trading must be such as is in the contemplation of the bankrupt laws, and if it appears that a person could not be a trader on the ground of *infancy*, or upon the ground that he is an uncertificated bankrupt, and his effects vested, I cannot think that this court has authority to adjudicate.”

Re JAMES HENRY HANCE. which require consideration, particularly *Butler v. Hobson*. It is also fit that I should consider what has been said, but at present I have no doubt that I am bound to consider an uncertificated bankrupt not competent to go on to a second bankruptcy. Although there have been threats to overthrow the law, yet, till that is done, I am bound to respect it. The parallel of the two cases seems to be admitted. The subject is perfectly certain to arise very often. Parties will be coming over and over again to take out protections against their creditors. It is therefore a question of great importance, and I will give it my best attention.

Cooke.—It has often happened in bankruptcy, that a second petition has been filed, but in those cases a final order had been made previously upon the first petition.

Mr. COMMISSIONER LAW.—I consider that makes no difference. As to that clause, about the construction of the word "property" (7 & 8 Vict. c. 96, s. 73), it does not affect the 7th clause of the first act (5 & 6 Vict. c. 116.) By that and the first clause, all the estate and effects of a petitioner is fully vested in his assignees, "and the said official assignee shall hold and stand possessed of the same in like manner as official assignees hold and possess estates and effects under and by virtue of the statute relating to bankrupts" (5 & 6 Vict. c. 116, s. 1.) I have as strong an opinion upon this subject, but it is fit before I state it finally, that I should look through the cases which I am at present led to believe form a long series of solemn decisions, and not to be designated mere *obiter dicta*. The question is, whether two protections are to be considered in the same light as two bankruptcies. As to the legal invalidity of a second bankruptcy while a first is subsisting, all the cases are one way. It is true that second commissions have been upheld in equity, but this is not a Court of Equity—it cannot grant injunctions—cannot impound commissions to prevent their being given in evidence.

Cooke.—*Ex parte Cridland* (2 Rose, 164) is a strong case.

Mr. COMMISSIONER LAW.—That depends upon what Lord Eldon said upon the law of the subject. He overthrew the practice of joint and separate commissions in cases of partnership.

Cooke.—The great point is, that he permitted separate commissions to subsist together. He allowed the thing to be done.

Mr. COMMISSIONER LAW.—But not the legality of it. If the petition in bankruptcy was dismissed, it would have been equivalent to a *supersedeas*, but the petition being retained there, carries with it all claims to present and future property. Our assignee cannot touch the property, and we will not grant a protection here without it merely for the debtor's convenience.

Cur. adv. vult.

JUDGMENT.

The question here is, whether a person, while his estate and effects, present and future, are vested in an assignee under a protection insolvency, should be allowed to receive another protection under these same acts against a new set of creditors; or whether

we ought to observe the principle upon which a new bankruptcy is not recognised while a prior bankruptcy is subsisting. It may *Re JAMES HENRY HANCE.* be said that the statutes do not prohibit such second petition. But *Second petition* — *Jurisdiction.* neither do they prohibit such second bankruptcy; and yet the invalidity of such second bankruptcy is declared in a long course of decisions by the most eminent authorities during the last hundred years. Mr. Cooke, in arguing the case for the insolvent, has not denied that, while future property remains so vested, the principle we speak of may be applied to the case of a second insolvency, as well as to the case of a second bankruptcy. But he has argued against the principle altogether, contending that the law is doubtful as applied to bankruptcy. He rightly informs me that, on a motion for cancelling a bail-bond, about ten years ago, two very distinguished men among the present judges are said to have shown an inclination to overthrow the long train of decisions by which this principle is established. But they are not overthrown: and the principle offers itself to our notice, sanctioned by the judgments of Lord Hardwicke, Lord Mansfield, Lord Loughborough, Lord Eldon, Lord Tenterden, Sir Nicholas Tindal, and other honoured authorities. The case alluded to, *Summers v. Jones*, does not, I believe, appear in any Exchequer Reports; but it is mentioned in the 3rd vol. of Montagu & Ayrton's Rep. p. 400. One cannot safely discern the precise nature or extent of the doubts that are intimated; but the deference due to the hesitations of able judges requires us to approach this subject carefully; especially as one of them had concurred judicially in two out of the many decisions to which I refer. The established rule is this: that the courts of law will not give effect to a fiat against an uncertificated bankrupt; and, ever since the Bankrupt Act of 1825, a third bankruptcy, where 15s. was not produced in the second, has been viewed in the same light; and for the same reason, that all future property becomes vested in the prior assignees, so that there can be nothing for a new bankruptcy to act upon. The expression commonly used is, that such commissions are void in law; and a case might arise, but never has arisen, producing the question, whether this term "void" is to be applied as signifying that degree of original vice which nothing can cure, not even the prompt *supersedeas* of the prior commission. I do not desire so to use it, for it seems reasonable that the superseding of a prior commission should set up a subsequent one. This question, however, has never been brought forward, and Lord Tenterden abstained from discussing it, as not called for by the matters before him. The meaning, then, which I shall attach and which seems usually attached, to the proposition that such fiats are void in law, is that it is an inveterate and most confirmed rule, that the courts of law will not give effect to so imbecile a process. Some there are who would test the subject by discussing whether the Lord Chancellor has the power to issue such unfruitful commissions. It happened once, perhaps more than once, that a judge, in declaring their invalidity, said that the Lord Chancellor had not authority to issue them. And in *Ex parte Welch*, Montagu's

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Rep. 276, some displeasure was expressed at that proposition, as limiting the power of the Great Seal. In this case, the special facts of which are not reported, the discretion exercised was, as it has been often before, not to supersede the commission. It is probably on the ground of that criticism, and possibly on a misapprehension of it, that certain writers, in a discussion tending to shake the established law, state the question to be this: "Whether the claim of the assignees to future property nullifies the Chancellor's power to issue another commission: (3 Mont. & Ayr. app. xlvi.) This seems to me to offer an important issue in false terms. The question is, whether such a bankruptcy shall have legal validity. Why should we discuss the power to issue it? The fact is, that the thing is never intentionally done; which shows that it would be wrong to do it. If ever a Lord Chancellor has knowingly and deliberately authorized the issuing of a commission against an uncertificated bankrupt, it must have been when joint and separate commissions were tolerated against the same party. It is now forty years since Lord Eldon, declaring, as his predecessors had done, that the second commission could not be maintained, observed that in earlier times a joint and separate commission were permitted to stand together, at the hazard of all the inconvenience that might arise with reference to legal questions; but that that course was altered: (*Ex parte Martin*, 15 Ves. 114.) I cannot help thinking that, if that great judge had been asked whether he had the power of issuing a commission against an uncertificated bankrupt, he would have said that it was an idle question,—that he had the power, inasmuch as nothing could prevent him from doing it, if he would,—but that he never should purposely issue such a commission, because it would be void at law, and the courts would not give effect to it. It might possibly be urged that, when a Lord Chancellor issues a fiat, the debtor's past life is not before him; so that, although such commissions may not have been advisedly issued, neither have they been advisedly refused. This may be so; a fiat, like other legal process, is a commodity which a party may purchase on signing certain prescribed forms, and paying the fees. But if the great official source of this process has never been put to the test, whether he would purposely issue a commission against an uncertificated bankrupt, we do know what happens when he finds out afterwards that he has done it. Such second commission has for above a century been declared by the Lords Chancellors, as it has by the other courts, to be void in law; and when, from circumstances of hardship, lapse of time, laches, oblivion, and so forth, it has appeared desirable to prevent an injustice that would arise from asserting the law and undoing that which has been innocently done, the Lord Chancellor has had recourse to the special weapons of his own court for evading or counteracting the law. Sometimes, indeed, he will not supersede a commission at the bidding of a party, but leave its merits to struggle against legal risk, as in *Ex parte Poulden*, 16 Ves. 472, where the party applicant was tainted with fraud. Sometimes he will aid it by

superseding the prior commission, whose existence makes it illegal: *Re James Henry Hance.* (*Ex parte Brown*, 1 Rose, 433.) Sometimes he will impound one commission in order to prevent proof of the illegality of the other: *Second petition — Jurisdiction.* (*Ex parte Tobin*, 1 V. & B. 308; *Ex parte Rowlandson*, 1 Rose, 416.) Do these things impeach the legal principle which I am asserting? Quite the reverse. The necessity of employing these resources of equity is the most authentic confirmation of the law which they are employed to defeat. That law is, that the courts will not give effect to a commission which is by the law powerless against property. A new notion was introduced not long ago; namely, that the commission was good, but the assignment under it bad. This seems a confusion of ideas. The legal nullity of the assignment and its futility from the want of property to act upon, are two different things. It is the latter fact which makes the bankruptcy itself unavailing, with all belonging to it. Considering by whom the doubts on this question are said to have been entertained, it seems fit shortly to point out the weight of solemn and direct authority on which the present law rests. In 1743 Lord Hardwicke said, "No second commission can be taken out, before he has his certificate under the first. I am of opinion that the second commission would have been void at law." Nevertheless, Lord Hardwicke, in the exercise of his discretion, did not supersede this second commission, because it had been expressly acquiesced in by the great body of the former creditors and assignees, on their receiving a sum of money from the second assignees: (*Ex parte Proudfoot*, 1 Atk. 252.) In 1778 Lord Mansfield said, "An uncertificated bankrupt cannot be the object of a second commission." And Mr. Justice Buller: "I take it to be perfectly clear that a second commission cannot be taken out against an uncertificated bankrupt. It would be entirely nugatory:" (*Martin v. O'Hara*, Cowp. R. 823.) In 1793, in *Ex parte Brown*, reported in 2 Ves. jun. 67, and 4 Brown, 211, Lord Loughborough says, "The determination in the King's Bench is right. There can be no doubt Lord Hardwicke lays it down directly that there cannot be a second commission during the subsistence of the first; but he would not suffer the creditors to quarrel with an act done by their own consent: they all came in and received the money." Here Lord Loughborough did supersede the second commission, having first said, "If the assignees in a second commission will pay 20s. to creditors under the first and all costs, I will supersede the first." These plain unambiguous doctrines had the full sanction of Lord Eldon during his long career of authority. In 1808 he said, in *Ex parte Martin*, on a petition to supersede a second, being a joint commission, "It is very clearly settled that, if a man has been declared bankrupt under a separate commission, another commission against him cannot be maintained until he has obtained his certificate under the former. If the creditors who oppose this petition will not undertake to supersede the first commission, I do not see how I can help them:" (15 Ves. 114.) He repeats the same doctrine often in the clearest terms, and never revokes it. In *Ex parte Rhodes* (15 Ves. 539), he says, "The first commission sub-

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sisting, the second is clearly bad." In *Ex parte Crewe* (16 Ves. 216), he says, "In law the second commission is good for nothing. The assignee cannot bring an action to protect himself under it. In short, the second commission cannot have any operation except under direction or arrangement. If a joint commission issues against persons, one of whom has been declared bankrupt under a separate commission against him, the joint commission is a nullity. So, a joint commission subsisting, a subsequent separate commission against one of those bankrupts is a nullity. We are now in the habit of making an arrangement, superseding the one or the other, as may best answer the ends of justice." The law was always the same. The interference of the Lord Chancellor was suited to the merits of each case. In *Ex parte Poulden* (16 Ves. 472), Lord Eldon says, "It is not to be inferred that, as the commission cannot be maintained at law, therefore it is to be superseded here." He refused to supersede, stating his conviction that there was fraud in those who made the application. In *Ex parte Munton* (1 V. & B. 60), he announces the principle in these very explicit terms: "My opinion has always been that, if the joint commission was the first, the separate commission was in law good for nothing; and, if the separate commission was the first, the joint commission was bad." Two years after that, there was a case to which Mr. Cooke particularly called my attention—*Ex parte Cridland* (3 V. & B. 94, and 2 Rose. 164.) A man was made bankrupt in Ireland. Then he and a partner were made bankrupts in England, and the commissioners were threatening to commit him for want of his books and papers. He petitioned for relief, suggesting one among other methods, that the joint commission might be superseded. Lord Eldon says, "The petition proceeds on the application of the present practice to the case of a coexistent prior commission in Ireland, with which the Great Seal in this country has no concern." He had been used to smooth the perplexities which arose from a plurality of commissions against different fractions of a partnership. Here one of the two was beyond his jurisdiction; and he made no order beyond that of requiring the commissioners not to compel the bankrupt to impossibilities. It was about a month before the argument in this case, that Chief Baron Thompson directed a nonsuit in the case of *Butts v. Bilke*; and Lord Eldon spoke with respect of the doubts of one so much humoured by the Profession and by himself. In the infinite variety of commercial cases which came before Lord Eldon, he strove always to fit a justice to the circumstances. This was his power, and his desire. Even where the petitioning creditor was an uncertificated bankrupt, he would not supersede without calling upon the assignees of that party, who might perhaps aid in a contrivance to qualify him. Such a party was *prima facie* incompetent to sue at law for the debt. Nearly twenty years later Sir Anthony Hart, Vice-Chancellor, held that such a debt could not sustain a commission, and substituted another debt, that the process might not fall to the ground: (*Ex parte Robinson*,

Mont. & Macarthur R. 44.) One case more will suffice to show how continuous has been the maxim which I would maintain in the courts where the bankruptcy is administered. As late as the year 1834, the Court of Review says, in *Ex parte Devas* (1 Mont. & A. 432), "There can be no doubt of the existence of the general rule, that a second fiat against an uncertificated bankrupt is void at law." What, then, are the decisions at law? They are more recent and more familiar than those which have been appealed to. In *Till v. Wilson* (7 B. & C. 684), the question was on the validity of a certificate to protect the bankrupt from arrest, when he was uncertificated under a prior commission. The case was argued by the ablest men at the bar, and, after taking time for the judgment, Lord Tenterden declared the certificate of no avail. The next is *Fowler v. Coster* (10 B. & C. 417.) Here the defendant sought protection by a certificate under a third commission, whether 15s. was not produced in the second. This appears the first case after the Act of 1825, which, by making future property to vest in the assignees, brought it within the principle of the other case; and it was avowed at the bar that they sought to have that decision reviewed. Here again, after taking time for judgment, the Queen's Bench held the certificate to be of no avail. The next case is *Phillips v. Hopwood* (1 B. & Ad. 619.) In trover by assignees, the question arose on evidence of title; and it was held that the plaintiff's title as assignees under a second commission failed, on showing the bankrupt to be uncertificated under a prior commission. There had been no notice to prove the three requisites, but this was held to be no admission of the legality of the commission. Mr. Justice Parke says, "The commission must be put in, and its validity is matter of law open to examination." The next case is *Nelson v. Cherrell*, in 1831 (7 Bing. 663.) Trespass for entering a house and taking goods. Justification as assignees of bankrupt. The replication showed a prior bankruptcy without certificate. Rejoinder that bankrupt had order and disposition by permission of assignee. Demurrer. The Court of Common Pleas said that the decision of the King's Bench was quite decisive; that they approved of it and would adhere to it. We find in the reports of the following year (8 Bing. 316), that there was another between the same parties, attended with the same result. It was tried before Chief Justice Tindal, who, on motion afterwards, recognised the correctness of the decisions, and refused a rule. I believe that I have sufficiently gone through the history of cases. It is the later one, which I mentioned in the outset from Mont. & Ayrton's Reports, which has caused the length of these observations. Mr. Cooke also called my attention to one which occurred shortly afterwards,—namely, *Butler v. Hobson* (5 Scott, 798, Hil. T. 1838.) But it has no authority to the point before us. Chief Justice Tindal says, "It is immaterial to determine whether or not the fiat was valid; because, if neither the plaintiff nor the defendant were entitled, the property would pass by the assignment under the Insolvent

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Debtors' Act." The fact was, that this third fiat issued when the debtor was in prison, and that, after it had issued, he petitioned this court. When arrested, he had the order and disposition of the goods in question by permission of the true owner, the assignee under the second bankruptcy. This assignee, therefore, the plaintiff, could not recover; and the only point decided was, that a trustee of that description must, by the 72nd section of the Bankrupt Act, lose by his laches, like any other actual owner. It is possible that the scruples thrown out in *Summers v. Jones* a few months before might disincline the Chief Justice from speaking on the value of the third fiat, the case not requiring it. Lord Eldon, in the same way, in *Ex parte Cridland*, treated with respect the doubts of Chief Baron Thompson, which had been expressed five or six weeks before. The case itself (I mean *Butler v. Hobson*) does not touch our question. Such, then, is the weight of authority, from the sages of law and equity, in support of the proposition, that an uncertificated bankrupt cannot be the object of a new bankruptcy. The only practical impediment which this doctrine has received from the Bench during the period which has been reviewed, is the nonsuit in 1814 (*Butts v. Bilke*, 4 Price R. 240); and there the doubt as to the invalidity of the second commission was not the only ground of objection. One question was, whether the plaintiffs, who had all acted and acquiesced in it, one as bankrupt the other two as assignees, could be allowed to impeach it? There was a new trial and a special verdict, which, by its informality, led to nothing. Surely the law of a century, with no other blemish than this nonsuit, which the learned judge was about to reconsider, had he lived to do so,—this law, which has received its most formal and most deliberate confirmations subsequently to that unfinished case,—has a strength not easily to be resisted. I am surprised that the reporters of bankruptcy cases should have ventured to vilipend these grave judgments. In controverting the proposition that the posterior commission is void in law, they write this; that there are various *dicta* to that effect, but that they seem opposed to the very decisions in which they are found. Again, they state that, though there are *dicta* that such a commission is void, it has never been so decided; and they add, that these *dicta* are founded upon the principle that the bankrupt is incapable of acting: (3 Mont. & Ayr. app. xxvii. &c.) Each and every of these statements is erroneous. Lord Hardwicke admits the law, lays down the law, and explains why, under the particular circumstances of the case, a Court of Equity declines to enforce it. In the case in Cowper, the doctrine of invalidity is insisted upon in terms, and is the very essence of the decision. Lord Loughborough afterwards, commending the doctrine of those two cases, declares the nullity, and supersedes accordingly. How can any man call these *dicta* and not decisions? Lord Eldon, in his directions for arrangement, chiefly in cases of partnership, acts upon the same rule of law as a clear postulate, and his decisions for avoiding the enforcement of the rule, have their whole meaning in his acknowledgment of the rule. It is per-

verse, then, to say that these decisions are adverse to the rule. *Re JAMES HENRY HANCE.*
 You might as well say that a court of equity denies the power of the courts of law, because it gives injunction to restrain a party from suing at law. The argument goes to this—that a Lord Chancellor who does not supersede a commission, asserts its legality; as if any party could compel a Lord Chancellor to supersede. The Chancellor says, “I can supersede any commission: but I do as I please: if you come without merits, I will not aid you: my powers are wielded for just purposes: I am not bound to enforce the law: I can interfere to prevent the law.” The allegation of the decisions being in opposition to the legal maxim is roundly applied by these writers to all the cases, both in law and equity: even to the later cases in the Queen’s Bench and Common Pleas, where we see that the nullity of such a bankruptcy has been the very point decided on solemn argument. Their comment on the foundation of the doctrine is equally mistaken: all the *dicta*, as they are denominated, are said to rest on the bankrupt’s incapacity of acting: and, this being said, certain slender capacities of acting are exhibited, as shaking the doctrine to its foundation. The foundation is misrepresented. Lord Tenterden himself tells us in terms in *Philips v. Hopwood* (1 B. & Ad. 619), that the decisions in *Till v. Wilson*, and *Fowler v. Coster*, were not grounded on the bankrupt’s inability to trade; but on this, that his effects still remain vested in the assignees under the prior commission. Look back to those cases—in one the words are “there is nothing upon which the commission can operate”—in the other the words are, “the effects are already vested in the assignees under a prior commission.” This same basis of the rule was plainly shown by Lord Loughborough fifty-five years ago, when he said, “The law having vested all the bankrupt’s property, and even possibility of property, in the first assignees, the second commission can have nothing to operate upon: (4 Brown, 211.) That other reason, of the more technical kind, is also sometimes brought forward: namely, that a party who is by law incapable of owning property wherewith he may pay debts, or of enforcing payment from those who may contract debts with him, is not to be deemed a trader, and thus wants one of the formal qualifications to bankruptcy. It might, perhaps, be added, that the infirmity of his position disables him from some acts of bankruptcy; he cannot fraudulently convey his estate and effects, for he can have no estate and effects to convey. But the substantial ground is, that a process for seizing property, in a case where the bankrupt law itself has provided that there can be no property to take, is to be repudiated for its absurdity. Lord Tenterden calls it, as Mr. Justice Buller had before, idle and nugatory. And observe, it is not that there is now no property which may be taken for the creditors concerned: that is common enough, but that the bankrupt law has inflicted an enduring pauperism, so that if property should come into existence, it cannot be taken. This inherent incapacity is sometimes denied. In the disquisition to which I have alluded, it is asserted as important, that the uncerti-

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fied bankrupt is capable of acting with all the world, except against his own assignees. If this were fully true, it would avail nothing. It is indeed the title of those assignees, which alone prevents him from having title. Is not this impotence enough? What is want of title, but that all title is in another party? It is urged that he may claim the wages of his daily labour, and that he may sue a stranger in trover or trespass. So he may; and, if his pocket is picked, the indictment may lay the watch as his property. But, if he sells that watch, can he sue for the price? He cannot. This was decided on demurrer by the King's Bench in 1838: (*Young v. Rishworth*, 8 Ad. & Ell. 470.) The action was for money had and received: and the plea showed the plaintiff to have been twice bankrupt, and certified, but that 15s. was not produced in the latter instance. The case of *Ex parte Robinson* had proceeded on the same principle. Among the innumerable vouchers for the inveterate doctrine by which I would abide, are these words of Mr. Justice Holroyd, in *Nias v. Adamson* (3 B. & A. 225):—"There is no doubt of the general principle of law, that an uncertificated bankrupt can have no assignable property." This broad proposition is not damaged by showing that some rights of humanity remain to him, that he may make some effort of personal maintenance and personal defence. Neither is its practical truth impeached by the remote possibilities which some have thought a sufficient answer to it. They blame you for saying of the posterior commission, that no property can arise under it, because, although future estate is pledged to another purpose, a time may come when it shall accrue more than sufficient for that other purpose. We are told, in the notes to Montagu & Ayrton's Reports, of a man who died after insuring his life; and that, if the creditors had not impeached his third bankruptcy, they would have had a readier access to the surplus of the insurance money. This proves rather too much; it claims exemption from the blemish of non-certification for any man who has raised out of his creditors so much as will effect a policy and pay a year's premium. There may be no saleable value: but the fact of his mortality, the possibility of his instant death, is offered as consideration for a bankruptcy. These chances were justly dealt with by counsel in the argument in *Ex parte Welsh*. The same speculation, which thus vindicates one or two bankruptcies concurrent with the old one, will vindicate twenty; and the last of the list will be sustained by the argument that here is no limit to the possibility of wealth. The answer is, that the law has not yet adopted that argument. The law says, "wait till the anticipating grasp of an efficient bankruptcy is withdrawn, before the prospect of assets not yet generated can be the consideration of a new bankruptcy and the privilege which attends it." A further reason, or rather an enforcement of the same, is expressed by Lord Tenterden, in *Fowler v. Coster*, where he points out the abuse to which such bankruptcy would tend. He says, "We cannot bring our minds to think that we are bound in a court of law, to give effect to a

commission, for the purpose of enabling a man to obtain a discharge, which is in law ineffectual for any other purpose whatsoever. The consideration of a bankrupt's discharge from his debts, is the giving up all that he has to his creditors; the bankrupt, in a case like the present, has nothing to give up; and, by contracting debts, he, in some sort, committed a fraud upon every creditor who trusted him. These observations illustrate the wisdom and policy of the rule which is laid down. But the denegation of certificate does not rest only on this principle of policy. There is the plainest evidence in the statute itself, that the Legislature contemplated no such case on which a certificate could be ingrafted. It seems almost superfluous to urge this. Is it not enough, that the debtor being incapable of ownership, his assignees must also be incapable; if you imagine a new process,—that, as he cannot sue for a debt, so neither could his assignees. But, if you still propose a man so circumstanced to a new career of bankruptcy, I ask, where is your law of certificate which should make part of that career? The scheme of the law comprehends no such incident; and this proves that the law has contemplated no such bankruptcy. There are two sorts of certificate; that which operates a release of debt, and that which operates only a protection of person. The former is an attribute of a first bankruptcy, or of a second where 15s. is produced; the latter attends a second bankruptcy, where 15s. is not produced. But this is only when the party got his certificate in the first bankruptcy. If he failed in that, there is no provision for him in the second whatever. It might be imagined, from the judgment in *Fowler v. Coster*, that in the letter of the law there was nothing to prevent certificate, and that the denial of it rested on principle and policy only. I say that it is a necessary deduction from the words of the statute, that there can be no such thing, inasmuch as even the mutilated certificate is provided only for the man who was discharged from his debts by the prior one; and the impossibility of this privilege in the given case, proves that the Legislature also contemplated as impossible the process of which it is the proper termination. I hope that I am stating the statute fairly. The 121st section of 6 Geo. 4, c. 16, provides for the effect of a certificate in ordinary cases. The 127th section prescribes a limitation of its effect in the cases of those who have before failed in their circumstances. Three such cases are enumerated: bankruptcy with certificate; composition; insolvency. Bankruptcy without certificate is not provided for. Why? Because, while that subsisted, another could not be. If it could, the result to the debtor would not have been left in silence; some less favourable fate would have been due to the uncertified than to the certified man. And observe, the enactment in question is a restraining one; the party we speak of is not within it: and, if you claim for him any sort of certificate, you must contend for the entire absolute discharge, and so give him a greater advantage than if he had gained his discharge under the first commission. This would be absurd; and we are brought to confess, on search-

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ing the statute, that there is no certificate at all in the case we speak of; the law has provided no such thing, because it never meant to sanction a bankruptcy out of which it could grow. This policy of the written law, with which all the decisions are conformable, further commands our assent, when we note to what perverse predicaments the toleration of many concurrent bankruptcies would lead. Suppose a man bankrupt in 1844, again in 1846, again in 1848, and no certificates. Suppose some original creditor to abstain from proof in all, and at last to take his debtor in execution. There he would be, with the option at any moment of releasing the defendant, and proving under any one of these proceedings; and there would be the other party with power to claim his discharge, if he could get a certificate signed under any one of the three. In asserting this to be the law, could one expect to be believed? And yet it is the law, if you overthrow all the decisions, and admit a plurality of subsisting bankruptcies. It is not easy to contemplate a first bankruptcy exercising, in the want of a certificate, its dominion over all accruing property through a succession of years, and yet to acknowledge during that period the occasional episode of a new bankruptcy, a phantom without reality, a process essentially incapable of benefit, either to him who pretends the attack, or, if I have rightly construed the statute, to him who is the object of it. When we reflect that the bankrupt code has itself provided that, in such a case, there can be no funds, no right of suit for creditors, and no resulting privilege for debtors, we can hardly desire to reverse the established law, that so futile a process shall be without value. It remains to be considered, whether the principle which thus prevails in bankruptcy governs also the case before us. By the 7th section of the first Protection Act, future estate and effects are vested in assignees, "to be held as fully as if the petitioner had been made a bankrupt." And so completely is he enslaved, that a penalty is provided on his failing to announce to them the acquirement of property. Accordingly, one who has incurred this insolvency, is at least under an equal incapacity of property with the uncertificated bankrupt. Both will ask protection against new creditors under the impotence of giving to those creditors the means of payment present or future. The utter want of consideration is the same in either case; and those who are jealous of the facility with which exemption from legal process may be purchased, will probably say that a protection taken out in this office is rather a more peremptory proceeding than a fiat in bankruptcy. It happened in this particular case, that the insolvent did not obtain his final order in the Court of Bankruptcy; and the learned counsel, Mr. Cooke, has apprehended that this might be to his prejudice, inasmuch as the future estate and effects unquestionably remain under the control of that court. In my opinion, no difference arises from this circumstance; and, if he had obtained that order, his future estate and effects would not the less have been vested in the assignee. I do not believe that a court of law

will hold the 73rd section of the 7 & 8 Vict. obliquely to operate *Re JAMES HENRY HANCE.* a repeal of the 7th, 9th, and 12th sections of the 5 & 6 Vict. If it had that effect, if the final order should confer a perfect release of debts, the security of the bankrupt code being withdrawn, and the temperate provisions of the insolvent law not substituted, no words would be too strong for denouncing the mischief of such a system. I think this climax is not arrived at yet. In the case before us all title will remain under the Bankrupt Court. If that court could have dismissed the petition which is before it, that would have operated like a *supersedeas* to a fiat, and have given force to the proceeding here. But that court holds its jurisdiction, and keeps the title to future estate; and the petitioner offers himself here under the statutable curse of continuing pauperism. Some, who have observed how often the same man can receive the benefit of the old insolvent act, may not at once see the difference of the two cases. They are very different. The prisoner, too, may be an uncertificated bankrupt, and thereby disabled from the effort of meeting new debts. But the law has come upon him, and he is not to be imprisoned for life. Some limit must be pronounced, according to his deserts, to the retributive justice which constrains him. Although his prior insolvency has had the odious incident which belongs to the bankruptcy and the protection systems, still the prayer of the prisoner must be heard. Everlasting punishment for debt is detestable as to property; as to person it is insufferable. There is not this cogency in the case of one who offers himself here a second time under the new law to be quit of new debts. To furnish such a person on an *ex parte* requisition, with another indulgence that suspends the creditors' legal rights, would be an abuse, and of the worst example. While the clear principle which I have desired to explain obviously affects the repetition of this sort of insolvency, the restriction to which it leads may be deemed salutary. The best argument for a *cessio* with prohibition of arrest before it has arrived is, that the debtor may be enabled to give his property to the law for equal distribution at an earlier stage of difficulty, not waiting till assets are exhausted. That argument will not apply to him who can own nothing, and can acquire nothing, and who, when he contracted the debts which he now finds inconvenient, was already in the same state of permanent disability. On all these grounds I find myself required to apply to insolvencies of this kind that principle which prevents a mockery of the bankrupt laws. I have had no desire to come to a conclusion which should compel me to dismiss a petition. A large discretion has been exerted during the six years for which this new code has been established, in freely dismissing petitions for various causes. I have resisted many of these causes, and would rather strain a point and find an excuse for dealing with a petition than for sending it away. But the question that has here offered itself cannot be evaded: it is one that must often arise and call for decision. I have given it my best consideration on its first occurrence, and I think that the objection is fatal.

COURT OF EXCHEQUER.

*Easter Term, 1850.*HARDING, Assignee, *v.* TINGEY.*Insolvency—Bill of sale—Costs of proving fraud.*

An absolute bill of sale is valid in case of insolvency, notwithstanding the provisions of sect. 61 of the Insolvent Debtors' Act. The 61st section of the Insolvent Debtors' Act applies only to conditional bills of sale.

Where defendant, in answer to an action of trover by the assignee of an insolvent for certain furniture, set up an absolute bill of sale, the plaintiff was allowed the costs of witnesses called to prove that such bill of sale was fraudulent.

MARTIN, Q. C., showed cause against a rule calling upon the plaintiff to show cause why the Master should not review his taxation. It was an action of trover by the assignees of General Bacon, an insolvent, to recover certain household furniture which had been conveyed to the defendant by an absolute bill of sale. The defendant claimed the goods as his property under the bill of sale, to which the plaintiff replied that the bill of sale was fraudulent, and he called a number of witnesses to prove such fraud. The plaintiff recovered in the action, and the Master allowed, on taxation, the costs of the witnesses to prove fraud, which amounted to about 200*l.* He contended that the Master was right in allowing the costs. The bill of sale standing unimpeached would have been an answer to the action—the witnesses to prove fraud were, therefore, necessary. He cited *Hunt v. Robins* (2 Gale & Dav. 646.)

Sir F. Thesiger, Q. C. contra.—The bill of sale was no answer to the plaintiff's claim, and it was, therefore, immaterial whether the bill of sale was fraudulent or not. The 61st section of the Insolvent Act prevents all bills of sale from being put in force after the commencement of the imprisonment.

POLLOCK, C. B.—The rule in this case must be discharged. We are bound by the construction put upon this section by the Court of Queen's Bench.

PARKE, B.—I have no doubt as to the propriety of the decision of the Court of Queen's Bench. The section in question only applies to conditional bills of sale. An absolute bill of sale is valid, whether the vendee avails himself of it previous to the insolvency or not.

ROLFE, B., concurred.

Rule discharged, with costs.

Ireland.

COURT OF QUEEN'S BENCH.

Trinity Term, 1850.

(Before the full COURT:)

*June 1.**LEWIS v. KELLY.**Contravention of the policy of the insolvent law.*

A. B. having petitioned the Insolvent Court, his discharge was opposed by the plaintiff on the ground of fraud, which opposition he agreed to withdraw, on being paid his demand in full; and, accordingly, having received a bill of exchange for the amount drawn by the insolvent upon and accepted by the defendant, he withdrew his opposition:

Held, that the agreement being contrary to the policy of the insolvent law, the plaintiff could not maintain an action upon the bill even against the acceptor.

THIS was an action by the indorsee against the acceptor of a bill of exchange. It appeared that the acceptor's brother having filed his petition as an insolvent debtor, his discharge was opposed by the plaintiff, who was one of his creditors, on the ground of fraud; but this opposition he subsequently agreed to withdraw on obtaining the full amount of his demand; and, accordingly, having received a bill of exchange which was the subject of the present action, drawn by the insolvent on and accepted by his brother, for the full amount of his claim, the plaintiff withdrew his opposition. There having been a verdict for the plaintiff, a conditional order was obtained on a former day to set it aside, and enter a verdict for the defendant, on the ground that the agreement entered into by the plaintiff was against the policy of the law and vitiated the bill.

Battersby, Q. C. (with whom was Edward Blackburne), now showed cause.

*Martley, Q. C., and Semple, in support of the conditional order, contended that the arrangement entered into was invalid, being a fraud upon the other creditors, who were not aware of the opposition to the insolvent's discharge being about to be withdrawn, or that the holder of the bill was to obtain the full amount of his claim; and that, therefore, the bill, although the acceptance of a third party, was void (*Cockshott v. Bennett*, 2 T. R. 765); and that though if he had not been an opposing creditor the case might*

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have been different. Here his withdrawal from opposition was a fraud upon the other creditors, and secured him an undue preference: (*Grundy v. Meighan*, 7 Ir. Law R. 519.)

E. Blackburne, in reply.—There are three grounds which vitiate a bill, where the consideration is illegal, or contrary to the policy of the law, or where there is fraud: (*Kay v. Bolton*, 6 T. R. 127; *Jackson v. Davison*, 4 B. & Ald. 696.) *Murray v. Reeves* (8 B. & C. 421), is distinguishable from the present case. The only way in which the policy of the insolvent law is infringed is where the party gets an undue portion of the insolvent's estate; though the creditor had not a right to deal with the insolvent himself, his dealing with a third party is *different*: (*Rogers v. Kingston*, 2 Bing. 41.) [MOORE, J.—Here the insolvent drew the bill; even if the acceptor did not pay it, could the indorsee have sued the drawer?] Though he had not a right to sell his forbearance to the insolvent, he had a right to sell it to a third person: (*Nerot v. Wallace and others*, 3 T. R. 17; *Kay v. Bolton*, 6 T. R. 134.) We are entitled to take it that there was no other opposing creditor.

BLACKBURNE, C.J.—You have no right to argue the case on that ground. There was no evidence that the other creditors had any participation in or knowledge of the transaction. The case has been fully argued. We struggled hard to resist the defence, as it has no merits, but demerits; but we have no doubts upon the subject. Our decision goes altogether on the ground of public policy. The principle was decided in the case of *Murray v. Reeves*, and it would be impossible to exempt the present case from the operation of it. The verdict for the plaintiff, therefore, must be set aside, and a verdict entered for the defendant.

INSOLVENT DEBTORS' COURT (IRELAND.)

May 30, 1850.

(Before Mr. COMMISSIONER FARRELL.)

Re Gossom. (a)

Friendly arrest.

The Court will sanction a friendly arrest where the object is to defeat an execution creditor and divide the debtor's property rateably amongst all his creditors.

ANDREWS and *Curran* opposed the insolvent on the preliminary ground of a collusive arrest. It appeared that Messrs. Magauley, the opposing creditors, were millers, and had given

(a) Reported by J. LEVY, Esq., Barrister-at-Law.

credit to the insolvent for flour to the extent of upwards of 500*l.*; *Re Gossom.* that they held his bond, with warrant of attorney, as security; *Friendly arrest.* and he having failed in his payments, they issued execution, which, at the solicitation of the insolvent's wife, they subsequently withdrew. The insolvent then gave a plea of confession to an attorney, to whom he owed a balance on the foot of a bill of exchange. Upon this confession execution was issued in a few days; upon which the insolvent, with the plaintiff's attorney, went to the sheriff's office, for the purpose of being arrested. He was arrested, and sent to prison, when he forthwith filed his petition and schedule. Counsel contended that, according to the well-established practice in England and Ireland, the court was bound to dismiss the petition when the arrest was clearly conclusive.

Creighton., for the insolvent, had been furnished with a recent English case by Mr. Levy, which, although coming before the court under different circumstances, the principle of friendly arrests was clearly sanctioned where they were had recourse to for the purpose of dividing the debtor's property rateably amongst his creditors.

The COMMISSIONER.—Is the case you allude to reported?

Levy.—The case is *Re Pelly* (1 Cox & Macrae, 22); reports which are prepared with care, and contain many valuable cases—cases applicable both to the law and practice in insolvency.

The COMMISSIONER.—The arrest was covertly planned to defeat the execution. Am I bound to dismiss the petition?

Creighton.—The effect of doing so would be to allow the opposing creditors to sweep all away, and leave nothing for any one else. The object and intention of the Insolvent Court is to make an equal distribution of property amongst creditors; and that being the intention of the debtor in getting himself arrested, the court, on the authority of the case cited, is bound to sanction it.

The COMMISSIONER.—Then the fairest way is to discharge the insolvent, and let an assignee be appointed; but this case is not to be taken as a precedent for every friendly arrest.

Curran.—Then in future any debtor wishing to defeat an execution, or to delay creditors, has only to get himself arrested and swear that he did so for their benefit.

The COMMISSIONER.—No, no; every case must be decided on its own merits or demerits.

The insolvent was discharged.

INSOLVENT DEBTORS' COURT (IRELAND.)

(Before Mr. COMMISSIONER ANDREWS.)

*Cork, August 1, 1850.**Re SHINE. (a)**Discharge from custody by detaining creditor, after hearing and before adjudication.**Where the case of an insolvent has been fully heard and is postponed to the following day, with a view to give judgment, which the court intimates will be adverse, and in the meantime the insolvent settles with his detaining creditor, and is discharged out of custody, the court has no jurisdiction over him.**Quære, are his bail discharged?*

THE insolvent in this case had been a bankrupt, and after several examinations before the commissioner in Dublin, his final examination was adjourned *sine die*. It appears that he had subsequently settled with all the creditors who had proved under the bankruptcy, and that they were anxious to consent to superseding his commission ; but, by a well-known rule in bankruptcy, a commission cannot be superseded by consent of creditors, unless the examination of the bankrupt is closed or passed ; and the insolvent, with a view to have future protection, procured himself to be sent to prison under a friendly arrest, and then filed his petition and schedule. Upon the hearing of his case some of the creditors who had not proved under the bankruptcy came in to oppose, and it appearing, as it did in the Bankruptcy Court, that he had given an undue preference to a favoured creditor, and otherwise sold and disposed of his property on the eve of bankruptcy, the Commissioner, after a patient hearing of the case, intimated that he would remand the insolvent for two years, and adjourned to the following morning with a view to deliver his judgment ; but upon the insolvent being called in court he did not appear, and it was ascertained that, during the previous evening, the detaining creditor, his friend, who had him in prison under a collusive arrest, lodged his discharge with the gaoler.

The creditors opposing said he should be called on his recognizance, that inasmuch as he came in to abide the decision of the court, his case was really heard ; the condition of the recognizance was that he should attend from day to day to abide the final judgment of the court.

(a) Reported by J. LEVY, Esq. Barrister-at-Law.

The COMMISSIONER said that the case was an exceedingly novel one. He believed, however, that the man being out of custody, he had no jurisdiction, and that it would be nugatory to pass a sentence of remand that could not be carried into execution. Quære, were his sureties bound to produce him to abide the judgment of the court?

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INSOLVENT DEBTORS' COURT (IRELAND.)

(Before Mr. COMMISSIONER CURRAN.)

*Dublin, August 7, 1850.**Re REV. J. COURTNEY. (a)**Friendly arrest.*

The court will sanction a friendly arrest where the object of the insolvent is to prevent expense, and make an equitable distribution of his property amongst his creditors.

THE insolvent in this case was a clergyman resident in the County Carlow; he had been arrested in Dublin, under a Manor Court decree, and came up to be heard on his petition and schedule.

Maher, for the opposing creditors, called for a dismissal of the petition, on the ground of a collusive arrest.

It appeared from the evidence given, that the insolvent was tenant under the Court of Chancery to certain lands which he held at a high rent, and having got into arrear, the receiver was about to proceed in the first instance by attachment against his person, and he also threatened to proceed by sequestration against his living; and the insolvent, to put an end to all proceedings, caused himself to be arrested, with a view to have his property administered by the Insolvent Court.

Crighten, for the insolvent.—It was well settled law, that where the object of the insolvent was to make a fair distribution of his property amongst all his creditors, and, either to prevent further litigation, or save the property from being swept away by one particular creditor, the court sanctioned friendly arrests. He cited *Re Petty* (Cox & Macrae, *ante*, p. 160); and *Re Gossom*,

(a) Reported by J. LEVY, Esq., Barrister-at-Law.

Re Courtney. decided in that court, upon the authority of the case in Cox & Macrae.

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Friendly arrest. The COMMISSIONER thought the opposing parties were less ~~damned~~ by the insolvent coming before the court upon a friendly arrest, and without putting any one to expense, than if he were brought there by the expensive process of attachment from the Court of Chancery: then, if the evidence were to be credited, and he saw no reason to doubt it, and the insolvent came before that court for the express purpose of having his property fairly administered amongst all his creditors, he thought he would be doing those creditors a great injustice if he were to dismiss the petition. He should, therefore, refuse the application and hear the case upon its merits.

INSOLVENT DEBTORS' COURT (IRELAND.)

Dublin, August 7, 1850.

(Before Mr. COMMISSIONER CURRAN.)

Re BURRIS. (a)

Opposition.

Where a creditor by accident omits to have his opposition entered when the case is first called on, although it is not then opened, and an adjournment takes place, he will not be afterwards allowed to oppose on the hearing.

CURRAN for a creditor, applied, upon an affidavit setting out the following facts, for liberty to oppose the discharge of the insolvent. It appeared from the affidavit, which was made by the attorney for the opposing creditor, that the case had been called on a previous day, when some creditors appeared and had their opposition entered. The attorney in question went to another court to seek for his counsel, and on his return, within an hour from the time the opposition of the other creditors was called on, he found that the case had not been at all opened or gone into, but had been adjourned to a future day.

Counsel now contended that, inasmuch as the case had never been opened or any of the grounds of opposition stated, and nothing

(a) Reported by J. LEVY, Esq., Barrister-at-Law.

done on the first day but a mere adjournment, his client ought not to be shut out because an accident had occurred. He admitted that if the case had been gone into, partly heard, and then adjourned, he would be too late. But the section of the act which gave the creditor the right to oppose, stated distinctly that he should be at liberty to do so at any time before the case was gone into.

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Practice.*

Crighten and *Power*, contra.—The practice in England and Ireland was settled on the point. A creditor, not answering when the case is called on, will not be allowed by the court to come in and oppose after the case has been gone into: (*Re Blore*, Cresswell, 165.)

Curran.—That case was in his favour; what he contended for was, that inasmuch as the case had not been gone into, he had a right to oppose.

The COURT.—The rule has been long established, that when a case is ripe for hearing, is regularly called on in court, and the names of the parties opposing taken down, even though it be then by consent, and for the convenience of those parties adjourned without being gone into, no creditor will be subsequently allowed to come in and oppose.

Opposition shut out.

INSOLVENT DEBTORS' COURT (IRELAND.)

(Before Mr. COMMISSIONER CURRAN.)

August, 1850.

Re WATERS. (a)

Admitting insolvent to bail.

Where the petition of an insolvent is dismissed on the ground of his having presented a schedule not giving a true account of his affairs, and although liberty may be given to file a new schedule, he will not be allowed to be on bail till the second hearing, unless there are favourable circumstances in the case which did not appear on the first hearing.

LEVY applied, under 3 & 4 Vict. c. 107, s. 21 (English analogous, 1 & 2 Vict. c. 110, s. 38), to have the insolvent admitted to bail pending the hearing of his case.

Geohagan, solicitor, opposed.

(a) Reported by J. LEVY, Esq., Barrister-at-Law.

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bail—Practice.*

It appeared that the insolvent, at the previous June circuit, was brought up for hearing at Mullingar before Mr. Commissioner Curran, and was opposed by his landlord, who was his detaining creditor, on the ground that his schedule did not truly represent the state of his affairs, and that he had not returned or accounted for certain government debentures amounting to 1,000*l.* which it was alleged he had in his possession two years previously. In support of the allegation of the existence of the debentures, a letter was produced, written by the insolvent in answer to an application made by the opposing creditor for his rent, wherein he stated that he had no money, inasmuch as he had purchased a government debenture. It further appeared that, shortly before the landlord obtained execution against him for the amount of a year's rent, he removed a portion of his stock to another farm, where it was seized under an execution at the suit of a person named Campion. His petition was accordingly dismissed, with liberty to file again, and upon application made to admit him to bail, the Commissioner said it would be a dangerous precedent, where an insolvent filed an experimental schedule, evidently to get rid of his rent, where he had suppressed property and removed any remnant he had to feed another execution, that, when that schedule was dismissed, he should be again admitted to bail.

Levy contended that there was no evidence of any suppression of property; all that could be said was, that the man, when pressed by his landlord for money, made an untrue apology as to the reason of his inability to pay; he never was possessed of a debenture or public security of any kind, and as to removing the property to feed another execution, he swore positively that he did no such thing.

The application was refused, with liberty to renew it upon any new state of facts that counsel might submit.

On a subsequent day the application was renewed upon affidavits, which stated that the insolvent, in the year 1844, paid a fine of 150*l.* for the land in question, and laid out 150*l.* more in useful improvements; that he lost largely by loss of crops and cattle during the disastrous years that just followed his taking the land; that when unable to pay he offered to give up the farm, but the landlord would not take it without security for the sum due; that the execution at the suit of Campion was for money advanced by him to assist in paying insolvent's rent, and that it actually went into the landlord's pocket, and, lastly, that he owed but one year's rent, 130*l.*, at the time his landlord arrested him and put him into prison, and that himself and his family were reduced to a state of destitution.

COMMISSIONER.—There are now circumstances of a most favourable character put forward by the insolvent, which did not appear at all on the hearing of the case; if they had, I would not have dismissed the petition. I would have heard it, and given the insolvent liberty to make any amendment necessary. At the same

time, I think the landlord was justified in his opposition to letting the insolvent out on bail, and he ought to have his costs. *Re WATERS.*

Application granted, two days' notice of the names of bail to be given to the landlord.

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Admitting to bail—Practice.

INSOLVENT DEBTORS' COURT (IRELAND.)

(Before Mr. COMMISSIONER CURRAN.)

Dublin, August, 1850.

Re FLYNN. (a)

Admitting insolvent to bail.

A debt due by a pay-clerk of the Board of Works in Ireland is a debt due to the Crown, and in case of his insolvency he cannot be admitted to bail without the consent of three of the Commissioners of Her Majesty's Treasury for the time being, certified under their hands, pursuant to the 3 & 4 Vict. c. 107, s. 92 (English analogous, 1 & 2 Vict. c. 110, s. 103.)

OFFEA, for the insolvent, applied to have him admitted to bail pending the hearing of his case. The insolvent was a pay-clerk in the employment of the Board of Public Works, and he (Mr. Offea) understood that the application to admit him to bail was to be opposed on the ground that the debt due by him to the Board of Works was a debt due to the Crown, and that under the statute the consent of three of the Lords of the Treasury should be given before the insolvent could be admitted to bail. He did not see how it could be construed into a debt due to the Crown. The insolvent had been employed by the Board of Works as their clerk, and certain moneys intrusted to him for payment as their servant or agent; in these payments there was a defalcation, for that defalcation he was sued, and a verdict had against him. If the verdict had been for him, he would have got his costs, as in a suit by any ordinary individual or public company, whereas, if it was a proceeding at the suit of the Crown, it would be conducted by the Attorney-General, and there would be no costs on either side. He thought it was a debt due to the Commissioners of Public Works as if it were due to a public com-

(a) Reported by J. LEVY, Esq., Barrister-at-Law.

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pany, and although they might be Crown debtors for the money advanced to them by government for public purposes, their mere servant or agent could not be regarded as a Crown debtor, and that the court ought to admit the insolvent to bail as in any ordinary case.

Perrin, for the Board of Works.—The question is not by whom the insolvent was employed, or whose agent he was, but did the money which was entrusted to him belong to the Crown? If it did, he was a Crown debtor: (*Belle v. Taffe*, 1 *Sauce & Sully*, 488; *Reg. v. Kelly*, 1 *Jones & Latouche*, 271.) The statutes under which insolvent was employed were the 9 & 10 Vict. c. 107, and 10 & 11 Vict. c. 87. These were the statutes under which the money was advanced by the government for public purposes, and with a view to give employment to the people. These moneys were advanced to the Commissioners of Public Works, and by them intrusted to pay-clerks in various counties, upon finding the security provided by the statute. The moneys actually expended were to be afterwards repaid by county assessments, and when so paid would be handed over to the consolidated fund, and again form part of the Queen's revenue. They were originally advanced out of the consolidated fund, and were intended to again revert to the same channel, and it was, therefore, plain, beyond the possibility of doubt, that the debt due by the insolvent was a Crown debt, and that he could not be admitted to bail without the permission in writing of three Lords of the Treasury.

Cur. adv. vult.

On a subsequent day, Commissioners BALDWIN and CURRAN gave judgment.—They had read all the statutes connected with the case, which was narrowed to one single point,—namely, to whom did the money belong? Suppose the insolvent himself, or his sureties, were now to pay the debt for which he was imprisoned, and from which he sought to be discharged by the Insolvent Act, how would the money be disposed of? It would not be used by the Commissioners of Public Works as a public company would use their money; it would be paid over to the consolidated fund, and become a portion of the Queen's revenue. There could be no doubt, therefore, that the debt was a Crown debt, and that the court could not discharge the insolvent on bail, without the consent of three of the Lords of the Treasury, as directed by the statute.

Application refused.

COURT OF COMMON PLEAS.

January 23, 1850.

PHILLIPS AND ANOTHER *v.* PICKFORD.

5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96—Final order for protection—Pleading in bar.

It was necessary to allege in a plea in bar under the general form given in the 10th section of the 5 & 6 Vict. c. 116, that the debt sued for accrued before the filing of the petition; but now a plea in bar, in order to be good under that section, as modified by the subsequent act (7 & 8 Vict. c. 96) should allege not only that the debt accrued before the filing of the petition, but also that it was named in the schedule.

DEBT by the drawer of a bill of exchange against the acceptor. The declaration stated that the bill was dated the 20th September, 1845, for 22*l. 4s. 6d.* payable three months after date.

Second plea.—That after the accruing of the said debts and causes of action, and before the commencement of this suit, to wit, on the 27th day of December, A.D. 1845, a petition for the protection of the defendant from process was duly, and according to the form of the statutes in such case made and provided, presented by the defendant to the Liverpool District Court of Bankruptcy, and thereupon afterwards, and before the commencement of this suit, to wit, on the 27th day of January, A.D. 1846, a final order for protection and distribution was made in the matter of the said petition by Charles Phillips, Esq., then being a Commissioner of the Court of Bankruptcy, duly authorized in that behalf, to wit, then being one of the Commissioners of the Court of Bankruptcy, authorized to act in the Liverpool district. And, further, that the said debts and causes of action, and every of them and every part thereof, were contracted before the date of the filing of the said petition in the said district Court of Bankruptcy. Verification.

Replication.—That the said petition for the protection of the defendant from process in the said plea mentioned was presented, and the said final order thereon therein also mentioned, was made after and not before the passing of an act of Parliament made and passed in a session of Parliament in the 7th & 8th years of her present Majesty's reign, intituled *An Act to amend the Law of Insolvency, Bankruptcy, and Execution.* Verification.

General demurrer and joinder in demurrer.

Hugh Hill, in support of the demurrer, cited *Nicholls v. Payne* (7 M. & G. 927); *Gillon v. Dean* (2 C. B. 309); *Wright v. Hutchinson* (4 C. B. 569); *Lawrie v. Bendall* (1 Cox, Macrae & Hertslet, 130); *Toomer v. Gingell* (3 C. B. 322); *Jacobs v. Hyde*, and *Platel v.*

PHILLIPS AND ANOTHER *Bevill* (1 Cox, Macrae & Hertslet, 156); *Nash v. Brown* (6 C. B. 584); *Miles v. Pope* (5 C. B. 294); *Lunn v. Thornton* (1 C. B. 379.)
 v.
 PICKFORD. *Cowling*, contrà, cited *Ex parte Caruthers* (9 East, 44); *Harcourt*
 —
 1850. *v. Fox* (1 Shower, 506); *Smith v. Coffin* (2 H. Black. 444);
 — *Crofton v. Poole* (1 B. & Adol. 568.)

Insolvent acts—Pleading in bar. The sections of the acts are very fully set out in the judgment.
Cur. adv. vult.

JUDGMENT.—*February 25.*

CRESSWELL, J., after stating the pleadings at length, said—
 This demurrer was argued before us with much ingenuity during last term. In support of the demurrer, it was contended that, although the alleged order for protection and distribution mentioned in the plea was made after the passing of the statute 7 & 8 Vict. c. 96, still the plea is a good and sufficient plea in bar by virtue of the 10th section of the former act, the 5 & 6 Vict. c. 116. By the first section of that act certain persons are enabled to present a petition to the Court of Bankruptcy for protection from process, and the court, or any commissioner to whom any such petition was referred, might give an interim order for protection against all process whatever, either against the person or property of the petitioner. By section 4 the commissioner was authorized, on being satisfied of certain matters, to grant an order, which should be called the *final order*, and should be for the protection of the person of the petitioner from all process, and for the vesting of his estate and effects in an official assignee, to be named by such commissioner, together with an assignee to be chosen by the majority in number and value of the creditors who may attend before the commissioner on such day, or for the carrying into effect such proposal as the petitioner shall have set forth in his petition. By the 5th section the commissioner was empowered to renew the interim order from time to time until the *final order* for protection and distribution. This clearly refers to the final order mentioned in the preceding section; and it gives to the order for protecting the person of the petitioner from all process, and for vesting the estate in assignees, the designation of “an order for protection and distribution.” Section 7 provides, “That from and after the passing of the final order, the whole estate, present and future, as well real as personal, and as well in the colonies, dominions, and plantations belonging to Her Majesty as in the United Kingdom of Great Britain and Ireland, all the effects and all the credits of the petitioner shall become absolutely vested in the official assignee and assignee chosen by the creditors.” And the 9th section gives the assignees a right to demand from the petitioner all property acquired by him after the final order, and enacts that, upon certain steps being taken, it shall absolutely vest in the assignees. These sections occasioned some discussion as to the word “future,” which occurs in the 7th section, but which it is unnecessary to deal with in deciding this case. Then comes section 10, in accordance with

which this plea is framed ; that section enacts, "That if any suit or action is brought against any petitioner for or in respect of any debt contracted before the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized, whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." In the present case, the plea alleges that, after the accruing of the debts, a petition for the protection of the defendant from process was duly presented by the defendant to the Liverpool District Court of Bankruptcy, and thereupon afterwards a final order for protection and distribution was made ; and that the said debts were contracted before the day of the filing of the said petition. If that section remained unaltered by any subsequent enactment, we think the plea in this form must be held to be a good plea in bar, and so it was conceded by the learned counsel on the argument of the case. The case turns upon the effect to be given to the subsequent statute (7 & 8 Vict. c. 96), the 1st section of which recites that it is expedient to amend the 5 & 6 Vict. c. 116, and the 74th section of that act enacts "That nothing herein contained shall be construed to repeal, affect, or in any manner alter the provisions of the said recited act (except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with, or at variance with, the provisions of this act.)" Now the 10th section of the former act is not expressly repealed ; the question then arises whether it is inconsistent with, or at variance with, the provisions of this latter act. In order to determine this we must inquire what was the nature of the order made under the former statute which the 10th section allowed to be pleaded in bar. By the 4th section (before referred to) it appears that it was a final order for the protection of the person of the petitioner from all process, and for vesting his estate and effects in assignees, which final order is, by the 5th section, named, "An order for protection and distribution." This order is by the 10th section allowed to be pleaded in bar to an action brought for or in respect of debts contracted *before* the date of the filing of the petition. The 4th section is not expressly repealed by the subsequent act, but it is inconsistent with the 22nd section of it, whereby it is enacted, "That the final order to be made under the provisions of the said act, as amended by this act, shall protect the person of the petitioner from being taken or detained under any process whatever in the cases hereinafter mentioned (that is to say), from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner *to the several persons named in his schedule as creditors*," &c., thus limiting its operation to the persons or claims named in the schedule. This is inconsistent with the 4th section of the former act, which applied generally to all debts contracted before the filing of the petition, and therefore, so far, repeals it. Upon the same principle, it appears to us, that

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if the 10th section of the former act is to be imported into the 7 & 8 Vict. c. 96, it must be with the qualification that the final order shall not be a bar to actions brought in respect of debts or claims mentioned in the schedule; for to allow it as a bar in other cases would be inconsistent with the latter act. This was not much disputed at the bar, but it was contended that the plea might still be pleaded in the form before given, and that if the debt was not mentioned in the schedule, that should be replied, and the case of *Platel v. Bevill* was cited as an authority to that effect, and so it is; but the question principally considered in that case was, whether a final order obtained under the 7 & 8 Vict. c. 96, constitutes an absolute bar to actions for the debts as to which it is a protection, or operates only as a protection to the person of the insolvent. The Court of Exchequer decided that it was an absolute bar, and after hearing a very able argument on that question, we are disposed to agree with that opinion, but abstain from binding ourselves by a decision on that point, inasmuch as it appears to us, that assuming the final order to be an absolute bar, in all cases, when it is a protection at all, still the plea is bad. In *Platel v. Bevill* the attention of the court does not appear to have been drawn to the limited operation of the final order made under 7 & 8 Vict. c. 96; namely, that it applies only to debts in the schedule, and not to all debts contracted before the filing the petition. In framing a plea in bar, under the 10th section of the 5 & 6 Vict. c. 116, it is necessary to allege that the debt sued for accrued before the filing the petition, to show that it was a matter on which the final order might operate, although the general form of plea sanctioned by sect. 10 made it unnecessary to set out the proceedings before the commissioner, it being the intention of the Legislature that matters decided by the commissioners should not be again disputed, as was observed by Tindall, C. J., in the case of *Cook v. Henson* (1 C. B. 908.) Upon the same principle, we think, in order to make a plea in bar good under the 10th section of the 5 & 6 Vict. c. 116, construed with regard to the 7 & 8 Vict. c. 96, it should allege, not only that the debt accrued before the filing of the petition, but that it was named in the schedule. For want of such averment it appears to us that the plea is bad, and our judgment must be for the plaintiff. But, considering the doubtful nature of the question that was argued, we think it right to give the defendant leave to amend his plea on the usual terms.

Leave to amend on judgment for the plaintiff.

COURT OF COMMON BENCH.

Easter Term, 1850.

WETHERELL v. JULIUS AND ANOTHER.

Insolvent—Beneficed clergyman—Sequestration—What causes of action pass to the assignees.

Case by an insolvent beneficed clergyman against the defendants for negligence as attorneys.

*The first count of the declaration charged that, in consequence of the negligence of the defendants, judgment was obtained against the plaintiff, and that he was brought before the Court of Exchequer by virtue of a writ of *habeas corpus*, and remanded to the Queen's Prison, charged with the amount for which the judgment was obtained, and that he was put to expense in endeavouring to reverse the judgment.*

Held (on general demurrer to a plea), that such cause of action did not pass to the plaintiff's assignees by the vesting order under 1 & 2 Vict. c. 110.

*The second count charged negligence in setting aside a *sequestrari facias* which had been issued against the plaintiff's living, by reason whereof the writ remained in force longer than it otherwise would have done, whereby the plaintiff lost the rents, &c.; but it did not aver any other damage.*

Held (on special demurrer to a plea), that the cause of action did pass to the plaintiff's assignees.

CASE for negligence against the defendants as attorneys for the plaintiff.

The first count alleged that an action of covenant had been commenced by one Thomas Langton against the now plaintiff, and he retained the defendants to defend him in that action; that they carelessly neglected to cause a demurrer in that suit to be argued, in consequence whereof judgment was given against him, which would not otherwise have been the case; and that judgment was given against him for a large sum of money, to wit, 14,000*l.* damages and 75*l.* costs, and afterwards he was taken by a writ of *habeas corpus ad satisfaciendum* before the barons of the Exchequer, and remanded in custody to the Queen's Prison, and thereby, and by virtue thereof, kept in prison, and he was put to the expense of a writ of error to reverse the judgment.

The second count alleged that the plaintiff was rector of Byfield, in the county of Northampton, and that one Charles Nesbitt caused and procured a certain writ of *sequestrari facias* to be issued out of the Court of Queen's Bench, founded on a judgment entered up under colour and pretence of a certain warrant of attorney

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executed by the plaintiff, whereby the Lord Bishop of Peterborough was commanded to levy from the rents, tithes, oblations, obventions, fruits, issues and profits of the said rectory and other ecclesiastical goods of the plaintiff in his diocese, a certain sum of 1,500*l.* and interest, at 4*l.* per cent. per annum, from the 28th of July, 1843, and all expenses of sequestration and levy; and the plaintiff, at the special instance and request of the defendants, employed and retained them as his attorneys for certain fees and rewards to be therefore paid by the plaintiff to the defendants in that behalf, to counsel and advise the plaintiff in and about the setting aside the said warrant of attorney, judgment, and writ of *sequestrari facias*, and to use due endeavours to set aside the same; and the defendants then accepted the said employment and retainer, and thereupon it then became and was the duty of the defendants, as such attorneys so employed and retained as aforesaid, well, faithfully, carefully, diligently, and skilfully to act as the attorneys of the plaintiff in and about the counselling and advising the plaintiff of and concerning the said warrant of attorney, judgment, and writ of *sequestrari facias*, and to use due endeavours to set aside the said warrant of attorney, judgment, and writ of *sequestrari facias*. And although a reasonable time for endeavouring to set aside the said warrant of attorney, judgment, and writ had elapsed before the commencement of this suit, yet the defendants, well knowing the premises, but neglecting and disregarding their duty and their said employment and retainer in that behalf, and contriving and intending to injure and aggrieve the plaintiff, did not well, faithfully, carefully, diligently, and skilfully counsel and advise the plaintiff of and concerning the said warrant of attorney, judgment, and writ of *sequestrari facias*, or use due endeavours or proper or any endeavours to set aside the said warrant of attorney, judgment, and writ of *sequestrari facias*, but, on the contrary thereof, wholly neglected so to do, and conducted themselves so carelessly, negligently, and unskilfully in and about the counselling and advising as aforesaid, and the endeavouring to set aside the said warrant of attorney, judgment, and writ of *sequestrari facias*, and in discharge of their duties as attorneys of and for the plaintiff, that by reason of such negligence, carelessness, improper conduct, and want of skill of the defendants, and by and through the neglect and default of the defendants, the said writ of *sequestrari facias* remained in force for a much longer time than it otherwise would have remained in force, to wit, for two years, and the said bishop, during the time, executed the said writ of *sequestrari facias*, and sequestered all and singular the rents, tithes, oblations, obventions, fruits, issues, and profits, and all other ecclesiastical rights and emoluments, of and belonging to the said rectory, and of which the said plaintiff was and is the rector as aforesaid, which he otherwise would not have done, whereby and by reason whereof the plaintiff became, and was, and still is, deprived of all and singular the rents, tithes, oblations, obventions, fruits, issues and profits, and all other ecclesiastical rights and emoluments of and belonging to,

and arising and accruing from the said rectory, to the damage of **WETHERRELL**
the plaintiff, &c.

Plea to the first count.—That after the making and passing of the 1 & 2 Vict. c. 110, and before the committing by the defendants of the grievances in the said first count mentioned, to wit, on the 20th of March, 1845, the now plaintiff was committed to the Queen's Prison, to be there detained under and by virtue of the said writ of *capias ad satisfaciendum*, to satisfy certain persons, and was under that writ kept and detained in the said prison, and thenceforth and until, and at the time of the commencement of this suit, the plaintiff was from the time of his being so committed as aforesaid, continually, and at the time of the commencement of this suit, kept and detained in the said prison under and by virtue of the same; and the defendants further say, that after the plaintiff had been so committed as such prisoner as aforesaid, and whilst he was such prisoner as aforesaid, and before the committing, by the defendants, of the grievances in the said first count mentioned, to wit, on the 30th of April, 1845, the plaintiff was, under and by virtue of a certain writ of *habeas corpus ad satisfaciendum*, brought before the Court of Exchequer, and was remanded to and charged in execution in the said prison, at the suit of William Thurmott, for a certain debt of 48*l.* theretofore recovered by the said William Thurmott, against the now plaintiff, and also for the sum of 11*l.* 12*s.* 8*d.* for damages and costs, under and by virtue of which said charging in execution the plaintiff was kept and detained in the said prison thenceforth continually until and at the time of the commencement of this suit. The plea went on to aver that the now plaintiff did not, within twenty days next after he had been so charged in execution at the suit of the said William Thurmott as aforesaid, or at any time after he, the now plaintiff, had been so charged in execution as aforesaid, and before the making of the order hereinafter mentioned, make satisfaction to the said William Thurmott for the said debt and damages, costs and charges, or any or either of them, or any part thereof, and thereupon afterwards, and after the expiration of the said twenty-one days, and after the committing by them, the said defendants, of the grievances in the declaration mentioned, and before the commencement of this suit, to wit, on the 10th of March, 1846, the said William Thurmott, so then being such creditor of the plaintiff as aforesaid, did file, according to the directions and provisions of the act of Parliament, a petition in the Court for the Relief of Insolvent Debtors, for a vesting order, that such order was accordingly made, and that by virtue of the same, and of the act of Parliament, the causes of action in the declaration mentioned, and each and every of them, became thenceforth and hitherto have been, and now are, vested in the provisional assignee. Verification.

To this plea the plaintiff demurred.

There was a similar plea to the second count, to which the plaintiff also demurred.

Peacock (with him *Paterson*), for the plaintiff.—The plea to the

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first count is clearly bad. The allegation alleges the arrest and imprisonment of the plaintiff, which is a cause of action which would not pass to his assignees. The defendants must show that the *whole cause of action* in that count passes to the assignees: (*Brewer v. Dew*, 11 M. & W. 625; *Rogers v. Spence*, 12 Cl. & F. 700; *Beckham v. Drake*, 11 M. & W. 315; *Margetti v. Williams*, 1 B. & Adol. 415.) The plea to the second count is also bad; although the injury therein alleged might be to personal property still it would not pass to assignees. The 55th section of the 1 & 2 Vict. c. 110 enacts, "That nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being a beneficed clergyman or curate, to the income of such benefice or curacy, for the purposes of this act: provided always that it shall be lawful for such assignee or assignees to apply for and obtain a sequestration of the profits of any such benefice, for the payment of the debts of such prisoner." The cause of action alleged in the declaration is the preventing the insolvent receiving the profits of the living before the insolvency occurred. These profits remaining in the hands of the sequestrator the assignees are now entitled to, and they are therefore in a better position than if the money had been received by the plaintiff.

H. Hill, for the defendants.—The first count is a tort, founded on a contract, and the cause of action passed to the assignees. This case falls within the general rule; the cases in which it has been held that the right of action for a breach of contract, does not pass to the assignees, are cases where the gist of the action is not the pecuniary damage, but the injury to the feelings. The second count is also good: the cause of action is the damage sustained by the loss of the profits of the benefice, which would pass to the assignees; it is not any personal injury to the plaintiff, it is therefore good: (*Smith v. Wetherell*, 17 L. J. 57, Q. B. was cited.)

Peacock, in reply, cited *Godefroy v. Jay* (7 Bing. 413); *Bishop v. Hatch* (1 A. & E. 171); *The Dippers at Tunbridge Wells* (2 Wils. 414); *Vansandau v. Crosbie* (3 B. & Ald. 13.)

Cur. adv. vult.

JUDGMENT.—June 24.

TALFOURD, J., now delivered the judgment of the court, and, after stating the pleadings as above, proceeded as follows:—The question raised on arguing the demurrer was, whether the causes of action in the first and second counts respectively mentioned, passed to the assignees under the Insolvent Debtors' Act? This subject has been recently fully discussed in the two cases of *Rogers v. Spence* (13 M. & W. 571), and *Beckham v. Drake* (11 M. & W. 315), both of which were carried by writ of error to the House of Lords, the former of which is reported in 12 Cl. & Finn. 700, and the latter in 13 Jurist, 921, and we think it unnecessary to enter at present into any further discussion of the principles on

which the question has been decided. The only thing required is to apply the rule given in those cases to the present. In the former, it was held that a cause of action arising out of a personal wrong, for which the party would be entitled to a remedy, whether his property were diminished or impaired or not, would not pass to the assignees. Now, in the first count of the declaration it is said, that in consequence of the negligence of the defendants, judgment was obtained against the plaintiff, and on that he was brought before the Court of Exchequer by virtue of a writ of *habeas corpus*, and remanded to the Queen's prison, charged with the amount for which the judgment was obtained. This is certainly a personal wrong, for which he would be entitled to a remedy wholly irrespective of any pecuniary loss. Accordingly, we hold that it did not pass to the assignees, and the plea to the first count is bad. In the other case of *Beckham v. Drake* (11 M. & W.) it was held, that where a pecuniary loss and damage is recovered, it does pass to the assignees, though such pecuniary loss may produce some inconvenience to the parties. Now, the second count of the declaration does not aver that the now plaintiff sustained by reason of the negligence imputed to the defendants, any other damage than the loss of the rents, tithes, oblations, obventions, and sequestrates; and as that, according to the last-mentioned case, did pass to the assignees, the plea to that count is therefore good, and the judgment on that is for the defendants. Judgment, therefore, will be for the plaintiff on the demurrer to the plea to the first count, and for the defendants on the demurrer to the second count.

Judgment for the plaintiff on the plea to the first count, and for the defendants on the plea to the second count.

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MIDDLESEX.

Brentford, September, 1850.

(Before A. AMOS, Esq.)

EMMERSON *v.* KING.*Schedule.*

*An insolvent who has scheduled a debt of more than 5*l.* as being less than 5*l.* is still liable to his creditor for the amount, and if he has come into property since his insolvency, the court will order immediate payment.*

THE plaintiff in this action, a tradesman at Twickenham, sought to recover 6*l. 7*s.** of the defendant, a retired captain of the British service.

The plaintiff having deposed to the delivery of the goods, the defendant pleaded that he was not liable to be called upon to pay the debt, inasmuch that he had a protection from the Insolvent Court, which he had passed through in February, 1849, and he handed in his discharge. The office copy of the defendant's schedule was then produced, by which it appeared that he had scheduled Mr. Emmerson for the sum of 4*l. 2*s.**

Woodyatt urged that it was a constant practice of insolvent petitioners to schedule the creditors under 5*l.* by which course they evaded service of notice to their creditors, and also escaped some additional expense. The defendant had, by his own admission, acknowledged that he owed the 6*l. 7*s.** and had scheduled Mr. Emmerson under 5*l.* As he had not complied with the provisions of the Insolvent Acts, he (*Mr. Woodyatt*) now called on His Honour to carry them out.

His HONOUR observed that it was clear Captain King had not complied with the provision in the insolvent laws, and had in this instance put himself out of their protection. He must give a verdict for the plaintiff.

The defendant pleaded for time, when

Woodyatt acquainted His Honour that defendant had through his marriage lately come into the possession of property.

His HONOUR upon this information immediately ordered payment forthwith.

MIDDLESEX.

Shoreditch, October 12, 1850.

(Before Mr. SERJEANT STORKS.)

BROCK *v.* YARNOLD.*Insolvency—Protection—Jurisdiction of County Court.*

A judge of the County Court has jurisdiction to commit an insolvent for non-payment of instalments under an order of the court, before the final order in insolvency, and after protection granted.

A judgment summons under the County Courts Act is not process within the meaning of the Insolvent Acts.

A protection for a limited time, granted by the Insolvent Court, is not a bar to proceedings in the County Court.

THE defendant was sued in this court in June last, and an order was made for payment of the debt, 3*l.* 10*s.* 10*d.* She had previously filed her petition in the Insolvent Court, and obtained an interim order. A judgment summons was subsequently issued, and the 8th of August was named for the hearing.

Buchanan now contended that the defendant, having filed her schedule in the Insolvent Court, under the 5 & 6 Vict. c. 116, and the 7 & 8 Vict. c. 96, and obtained her protecting order, the jurisdiction of the County Court was null and void, and that the court was estopped from committing her to prison. The protecting order in express terms set forth that the party is protected from all *process whatever*, either against the person or property, of every description; and section 4 of 7 & 8 Vict. c. 96, vested the whole of the insolvent's present and future estate in the provisional assignee. Upon that state of things the defendant came up to be heard upon her petition at the Insolvent Court, on which occasion a day was named for her final order, and on that hearing the court adjourned the hearing from three months to three months, giving the insolvent an opportunity to pay 5*l.* a month in gradual liquidation of her debts. The insolvent had now no property whatever, nor could she acquire any, for until her debts were paid, all her debts belonged to the provisional assignee; and it was only upon condition that she kept up her payments that the Insolvent Court would renew her protection. If she were to pay the debt now sought to be recovered, such an act would be considered as a fraudulent preference against the rest of the creditors, and her petition would be dismissed. It was clear that the framers of the County Courts Act contemplated a party who was or had been in a position to pay since the debt was contracted, when they delegated to the

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judge the power to commit; for the 99th section distinctly set forth, that if it shall appear to the judge that the defendant *has or has had the means to pay*, it shall be lawful for such judge to order the defendant to be committed. Now what was the position of this party? All her property was confiscated. How, then, could it be said that she had the means to pay? Besides, the same care was taken of this creditor by the Insolvent Court, as was taken of all the other creditors, and he would participate in the dividend, when declared, with the rest of the creditors. To comply with this creditor's request to commit the defendant would have the effect of disenabling her to comply with the order of the Insolvent Court, the result of which would be the dismissal of her petition, whereby the means of exercising her talents for the benefit of her creditors, as well as providing for her own and her children's existence, would be entirely cut away from her; the principles of the insolvent laws would be violated, and would no longer be of any benefit, except to deceive the unfortunate debtor who was induced to file his petition, under the delusive hope that the learned commissioner is empowered by an act of Parliament to protect him from imprisonment. It was submitted that His Honour had no power to commit the defendant, and that the summons ought to be dismissed.

His HONOUR said, as the question raised was one of considerable importance, he would defer his judgment until he had looked into the various acts of Parliament which had been cited.

JUDGMENT.

At a subsequent sitting of the court, his Honour gave judgment as follows:—I am to consider in this case whether I have the power to commit the defendant. It is important that I should specify dates. On the 11th June, 1850, the defendant filed her petition under the Insolvent Act for protection. On the 22nd of the same month a summons was heard, and an order made for payment of 3*l.* 10*s.* 10*d.*, and 14*s.* 4*d.* costs, on or before the 22nd of July then next. The defendant came up to the Insolvent Court on the 3rd of July, and the 24th was the day appointed for the final hearing. No final order has yet been made; but protection was given to her for three months, an order being made for payment of 5*l.* per month to the provisional assignee of the Insolvent Court. On the 8th of August a judgment summons was heard by me, and adjourned; it being contended that I had no power to commit under the act of Parliament by which these courts have been established; it was urged that such a course would be in contravention to the Insolvent Acts, which gave power to discharge parties from all debts inserted in the schedule. Upon these facts and these dates I have to give my opinion. I have just adverted to the fact that there is no final order in this case; which I consider of importance in the particular case; but I consider also the question of general and independent jurisdiction involved, and I have taken time, therefore, to confer with one of my learned brothers, and to look into the acts

of Parliament. It is a question involving punishment and liberty, and in which the debtor and creditor are at variance. Two great systems have been created by these acts of Parliament; and the question is, whether they can be made coadjutory, and act together, and assist one another; or if not, which is to prevail? This makes it necessary for me to take a view of the Insolvent Acts, and also of the County Court Act of 9 & 10 Vict. It is quite clear that the object of the Insolvent Acts was to secure the liberty of the debtor, and protect him from imprisonment as to all debts inserted in the schedule, if he had fairly and honestly given up his property for distribution amongst his creditors. It is to be remarked that at the time the Insolvent Acts passed, the 9 & 10 Vict. had not passed, and probably had not been contemplated: and it might be very easy to carry out the Insolvent Statutes, had not the 9 & 10 Vict. passed since. With respect to the 5 & 6 Vict. c. 116, amended by the 7 & 8 Vict. c. 96, it is perfectly clear that the object was, as explained by the preamble, to protect debtors from all "*process*" involving their personal liberty, who had not been guilty of fraud, or gross or culpable negligence, and that such parties were to be relieved with certain exceptions. And that word "*process*," involves in it mainly the question, namely, whether it embraces a commitment summons under the 9 & 10 Vict. c. 95? I am of opinion it does not. But I will proceed with the analysis of the statutes. By section 4, a final order may be granted; section 5 enables the commissioners to renew protection, and section 10 bars all suits:—it does not *expunge* the debt, but expresses that it shall be a sufficient plea in bar. But the last point does not arise in this case, as the defendant did not plead the insolvency; and no person can avail himself of that act unless it is pleaded in answer to the action itself. But even if pleaded, the plea could not be sustained unless there were a final order—which exists not in this case. And even if there were a final order, and the party had no opportunity of pleading it, still the question arises whether he can be committed to prison under 9 & 10 Vict. c. 95, notwithstanding the 5 & 6 Vict. c. 116, as amended by the 7 & 8 Vict. c. 96. A final order under the latter statutes protects a party from all *process* in respect of the several sums due at the filing of the petition, and section 26 extends it to all *process* against payment of the various sums of money so inserted in the schedule. There has been a question raised under the new Bankruptcy Act, in which one of the learned commissioners doubted whether a party could not be committed for contempt for not paying a sum of money ordered by the Court of Chancery to be paid: but that is merely to enforce a payment, and does not involve punishment for fraud. From this summary of the *Insolvent* Acts, I am of opinion the defendant, if not guilty of fraud under those acts, would have been entitled to her discharge. Then arises the question under the 9 & 10 Vict. c. 95,—if that and the Insolvent Acts can be reconciled, and if not, which, in this case and in this court ought to prevail? I now proceed to consider more in detail the 9 & 10 Vict. c. 95. That act was

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passed for the more easy and speedy recovery of small debts, and gives to the creditor increased power to recover such debts. The machinery of the County Court Act, is, in my opinion, incompatible with the Insolvent Acts. But in this case, the main question is, whether there is a power reserved to this court contrary, I admit, to the *policy* of the 5 & 6 Vict.? a power intended for another purpose, which is not at all destroyed or affected: and that depends upon the construction that shall be given to the County Court Act, in reference to the right of commitment, notwithstanding the Insolvent Act. The object of the former was clearly to enforce the payment of small debts; but independently of that, the question is, whether the power still remains to commit, and whether a judgment summons and commitment are process? There are two great systems which the Legislature has created:—the first protects the insolvent from imprisonment, the other enforces the payment of his debts, and punishes for improvidence or fraud, according to the discretion of the court, and gives power to bring into court the party, to answer for such improvidence or fraud. It arms the court with immediate power on the hearing of the original summons; to commit for fraud then and there; it gives also, the power to the court to commit for the same cause on the hearing of the *judgment* summons, upon an inquiry into the defendant's means and conduct, and gives throughout *discretionary* power to commit. How can this be considered *process*, which is in the hands and at the will of the court. Assume, for a moment, that an insolvent has had the means to pay, and has not paid. If it be contended that the County Court cannot commit, then the act of Parliament would be to that extent nugatory. It cannot be said that an insolvent in all cases has not the means to pay, although taking the benefit of the Insolvent Act; and it is necessary to bear in mind that, although he puts in his schedule his debts, the debt is not expunged, nor are his future effects discharged. The question is, whether this court has taken from it the power of inquiry, when there has been no insolvency pleaded, and where a judgment summons has been issued, whether this court is utterly powerless to commit, notwithstanding the party may be guilty of fraud, and having the means to pay? which he may have independent of his future property, which is vested in the official assignee. The act of Parliament is strong in many of its terms. The 99th section enacts, "that if a defendant shall not attend, as required by the summons, or shall, if attending, refuse to be sworn, or if he shall not make answer touching his estate and effects, and the circumstances and manner under which he contracted the debt, to the *satisfaction* of the judge, or if it shall appear to such judge, by the examination of the defendant, or by any other evidence, that such defendant incurred the debt under false pretences, or breach of trust, or has wilfully contracted such debt or liability, without having had at the time reasonable expectation of being able to pay the same, or shall have made any gift or transfer of any property, or shall have concealed the same with

intent to defraud his creditors," &c., "and it shall appear to the satisfaction of the judge that the defendant has then, or has had since the judgment, sufficient means and ability to pay the debt or damages recovered against him, either altogether, or by any instalment or instalments, which the court in which the judgment was obtained shall have ordered, and that he has refused or neglected to pay the same as so ordered, it shall be lawful for such judge, if he shall think fit, to order that any such defendant may be committed to prison for any period not exceeding forty days." The question is, whether one act takes away the discretionary power of the other? The 101st section enacts, that the judge shall have power to examine and commit to prison at the hearing of the cause. Then comes a very important clause, namely, the 102nd, and that enacts, that, whenever any order of commitment shall have been made, the clerk shall issue a warrant of commitment directed to one of the bailiffs of any County Court, who shall be empowered to take the body of the person against whom such order shall be made; and the gaoler of the prison mentioned in any such order shall be bound to keep the defendant therein until discharged under the provisions of this act. And then it goes on to say: "And no protection, order, or certificate, granted by any Court of Bankruptcy, or for the relief of insolvent debtors, if obtained after such order for imprisonment is made, shall be available to discharge any defendant." It has been said elsewhere, that that clause only contemplates a party not in custody. What then? That is this case, and leaves the question where it was, and I do not understand the distinction. If the gaoler has the power to take him, he has the power to keep him. There is another clause which ought to be adverted to, and which alone has created a doubt in my mind, viz., clause 110, and which is to this effect, that a debtor may be discharged upon payment of debt and costs. In a discussion in another place, it struck me as singular that this clause was not adverted to. That clause is open to an argument, and the difficulty that has occurred to me is, whether that clause does not show imprisonment to be in the nature of an attachment for the enforcement of the debt? Taking the whole, however, together, I think there is a power vested in the judge to commit, notwithstanding the Insolvency Acts and protection order; still bearing in mind that there is no final order. It was argued in the case alluded to, that it was nonsensical to give the discharge to an interim order, and not to the final order. My idea is that the final order alone gives permanent protection; but I am of opinion even, that does not give protection against a commitment by this court. Be that as it may, no final order has been granted in this case. Looking at the policy of the County Court Act, I think this is not a case contemplated by the Insolvent Acts. The County Court Act is a new and subsequent system, vesting in the court the power to punish fraud, and to commit even the party on the hearing of the original summons. I am of opinion a judgment summons under this act is not "*process*" within the meaning of the

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Insolvent Acts ;—that the defendant may be committed for non-attendance—for fraud—for having had the means to pay since the original judgment, and not having paid ; and which means (the debt not having been extinguished by the Insolvent Act), do not pass to the provisional assignee : and of which instances can be easily supplied, and will readily occur. At the same I am of opinion that the final order does not put an end to the jurisdiction of the County Court in this respect. Looking at this case, I consider the court has the power to commit, but I will not make an order of commitment until I hear the circumstances of the defendant. It may turn out that she has nothing ; but I hold that I have the power to exercise my discretion. It is one thing to have the power to commit, another to exercise it, and in this case it may turn out, upon investigation, that the whole of the defendant's effects are vested in the official assignee, and that she is totally deprived of the means of payment, and has no other means of payment in her power than that which had been ordered by the Insolvent Court.

The defendant subsequently applied to the Lord Chief Justice for a writ of prohibition, and His Honour adjourned the further consideration of the case *sine die*.

COURT OF EXCHEQUER.

Easter Term, 1850.

HARDING, Assignee, *v.* TINGEY.

Bill of sale—Validity of—Insolvency—Trover—Costs—1 & 2 Vict. c. 110, s. 61.

Trover by the assignee of an insolvent.

Plea, that insolvent was not possessed.

The plaintiff, to prove that at a certain time the insolvent was possessed, put in evidence a bill of sale, by which the insolvent professed to assign an absolute right to the property in question to the defendant, and then proceeded to show that such bill of sale was fraudulent.

A verdict was returned for the plaintiff.

Held, that the Master was right in allowing the plaintiff the costs of impeaching the bill of sale. That the 61st section of the 1 & 2 Vict. c. 110, does not apply to an absolute bill of sale, but only to a conditional bill of sale, and that therefore the plaintiff was entitled to give evidence of the fraudulent nature of this document.

MARTIN, Q. C., showed cause against a rule calling upon the plaintiff to show cause why the Master should not review his taxation. In this case an action of trover had been brought by the assignees of General Bacon, an insolvent, to recover certain

household furniture which had been conveyed to the defendant by an absolute bill of sale. The first count in the declaration alleged the goods to be in the possession of the insolvent. The second, that they were in the possession of the assignee. Pleas, first, not guilty; and to first and second counts respectively, not possessed. The defendant claimed the goods as his property under the bill of sale, to which the plaintiff replied that the bill of sale was fraudulent. At the trial before Pollock, C. B., at the Middlesex sittings after Trinity Term last, the plaintiff put in evidence a bill of sale of the goods in question, dated 24th July, 1847, to prove that the insolvent was at that time possessed of them, by which it appeared that in consideration of 375*l.* the insolvent bargained and sold the furniture to the defendant and others, "to have, hold, and take the furniture to them for their absolute use and benefit," and since the insolvent's imprisonment the defendant had sold the goods, and a number of witnesses were called to prove that the bill of sale was fraudulent. The plaintiff recovered in the action, and the Master allowed, on taxation, the costs of the witnesses to prove fraud, which amounted to about 200*l.* The defendant then obtained this rule. It was now contended that the Master was right in allowing the costs. The bill of sale standing unimpeached would have been an answer to the action—the witnesses to prove fraud were, therefore, necessary. He cited *Hunt v. Robins* (2 Gale & Dav. 646, 3 Q. B. 300.)

Sir F. Thesiger, Q. C., contra.—The bill of sale was no answer to the plaintiff's claim, and it was, therefore, immaterial whether that was fraudulent or not. The 61st section of the 1 & 2 Vict. c. 110, (a) was a complete answer to the defendant's claim under the bill of sale, and the evidence therefore was unnecessary, and that being so, the defendant ought not to be compelled to pay these costs. The question is, whether the plaintiff was justified in incurring the expense of impeaching the bill of sale.

POLLOCK, C. B.—The rule in this case must be discharged. We are bound by the construction put upon this section by the Court of Queen's Bench. The case of *Hunt v. Robins* was decided upon demurrer, and might have been taken to a higher court. Without, therefore, offering any opinion on the construction of the act of Parliament, I think that where there is a decision of a court of co-ordinate jurisdiction, we ought to be bound by it, especially in a case where, if our conclusion is wrong, it cannot be reviewed.

(a) The 61st section of the 1 & 2 Vict. c. 110, enacts, "That in all cases where the prisoner whose estate shall have been vested in the said provisional assignee under this act shall have executed any warrant of attorney to confess judgment, or shall have given any *cognovit actionem*, or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained, or to be obtained upon such warrant of attorney or *cognovit actionem*, or of such bill of sale, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized, or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney or *cognovit actionem*, or of such bill of sale, shall and may be a creditor or creditors for the same under this act."

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PARKE, B.—I think it was only a proper precaution taken by the plaintiffs to be prepared to prove that this bill of sale was fraudulent, and therefore void. I have no doubt as to the propriety of the decision of the Court of Queen's Bench. The section in question only applies to conditional bills of sale. An absolute bill of sale is valid, whether the vendee avails himself of it previous to the insolvency or not.

ROLFE, B., concurred.

Rule discharged with costs.

COURT OF EXCHEQUER.

November 16, 1850.

HARVEY *v.* HUDSON.

Case against the keeper of the Queen's Prison—Habeas corpus—Not guilty by statute—Discharge under 1 & 2 Vict. c. 110—Warrant.

Case against the keeper of the Queen's Prison for not having the body of a debtor before the court, pursuant to a habeas corpus ad satisfiendum. Plea, not guilty by statute. A debtor in the custody of the defendant petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110, s. 35. The vesting order was made on the 7th January. On the 27th March the plaintiff sued out a habeas corpus ad satisfiendum, returnable on the 15th April. On the 8th April the petition came on for hearing, and an order was made for the insolvent's discharge; and on the same day a warrant of discharge was made directing that, as to plaintiff's debt, he should be discharged as soon as he should have been in custody for three months, to be computed from the date of the vesting order, 7th January, which time had then expired, and he was accordingly discharged. The defendant on the 15th April returned to the writ of habeas corpus, that the debtor was discharged by a warrant of the Insolvent Court.

Held, that defendant might plead "not guilty by statute," and give the act and the special matter in evidence, under 1 & 2 Vict. c. 110, s. 110. That the warrant, although ungrammatically expressed, was not void, but meant that the debtor should be discharged forthwith.

That the defendant was bound to discharge the debtor, and had no authority to enforce his presence on a future day, so as to produce him at the time of the return of the habeas corpus, and, therefore, that his return to that writ was good.

THIS was an action in case against the keeper of the Queen's Prison. The declaration stated that the plaintiff, by the judgment of the court, had recovered against one W. P. Hallows

a debt of 20*l.* 7*s.* 3*½d.*, and 24*l.* 19*s.* 8*d.* damages; that Hallows, being then a prisoner in the Queen's Bench Prison, of which the defendant was the keeper, the plaintiff sued out a *habeas corpus ad satisfaciendum*, directed to the said keeper, directing him to have Hallows before the Barons of the Exchequer, to satisfy the plaintiff his debt and damages; that the defendant suffered Hallows to be at large, and had not his body according to the exigency of the writ, and returned to the court that Hallows was discharged out of his custody by the warrant of the Insolvent Court, and that Hallows was not in custody at the suit of the plaintiff, nor had he surrendered, or been produced before the Barons of the Exchequer.

Plea, "Not guilty by statute."

At the trial at the sittings for London, before Martin, B., the defendant obtained a verdict.

Baddeley moved for a new trial, on the ground of misdirection. The plaintiff was a linendraper in the Westminster-bridge-road, and in the course of last year a person named Hallows became indebted to him in a sum of about 20*l.*, for which an action was brought in the Court of Exchequer. The plaintiff had for some time been unable to find out the address of Hallows till, in the early part of this year, he received notice that he was in the Queen's Bench prison, and about to apply for his discharge under the Insolvent Debtors' Act. On the 2nd of January, Hallows signed his petition for his discharge under 1 & 2 Vict. c. 110, s. 35. On the 7th the vesting order was made, and on the 4th of March the insolvent filled his schedule. On the 27th of March the plaintiff sued out a writ of *habeas corpus ad satisfaciendum*, returnable on the 1st day of Easter Term, viz., the 15th of April. On the 8th of April the insolvent's petition came on for hearing, when an order for his discharge was made, and on the same day, no detainer having been lodged against the prisoner, a warrant of discharge was made, and duly served at the Queen's Bench Prison on the 9th, when the prisoner was discharged. On the 15th of April the defendant returned to the writ that Hallows was discharged out of his custody, as to the detainer of the plaintiff, on the 9th of April, by a warrant of the Insolvent Debtors' Court.

This warrant was in the following form:—

"Upon adjudication duly made herein, it is ordered that the said prisoner shall be discharged from your custody *forthwith* as to the detainer of W. G. Smith, and that the said prisoner shall be discharged from your custody as to the detainer of J. Harvey, at the period of three calendar months, *to be computed from the 7th day of January, 1850*, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf. And for so discharging the said prisoner from custody as to the several detainers respectively, this shall be your sufficient warrant.

"By the Court.

"To the Gaoler or Keeper of the said gaol."

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warrant.*

At the trial it was contended for the defendant that he was justified and bound to set the debtor at liberty at the expiration of the period for which he had been remanded; but the plaintiff submitted that he ought to have allowed the plaintiff an opportunity to apply to the court; it was also objected that the defence could not be given in evidence under the plea of "Not guilty by statute." The learned judge directed the jury that the defendant, as keeper of the prison, was not bound to look to the adjudication; he had merely to look to the warrant, and his duty was to obey the order of the court, and his return therefore was proper. He also ruled that the plea was strictly in accordance with the provisions of the act of Parliament, which enacted that the officers should be indemnified for whatever they did in obedience to the courts, and if any action should be brought in respect of such discharge of duty, such persons were empowered to plead the general issue, and give the special matter in evidence. Upon this direction the jury found a verdict for the defendant. It was now contended that this direction was wrong. 1st. The defendant was not entitled to plead the general issue, and give this evidence under it. 2nd. Even if he were so entitled, the order could not operate as an order for the immediate discharge of the prisoner from the suit of the plaintiff, and whatever might be the effect of the warrant, it was the duty of the defendant to produce the body of the prisoner in obedience to the writ of *habeas corpus*. The adjudication is already bad, for it directs the debtor to be kept in prison for three months from the date of the vesting order, which period had expired at the date of the adjudication. It is insensible and nonsensical: (1 & 2 Vict. c. 110, ss. 75, 76, 78.) *Thomas v. Hudson* (14 M. & W. 353); and *Watson v. Bodell* (14 M. & W. 57) were referred to.

POLLOCK, C.B.—This case is free from doubt, therefore no rule will be granted. The question is, whether this defence was open to the defendant under the plea of the general issue, and if so, whether the defence is good. I not only think it is so open, but I am inclined to think that even without the statute the defendant might have proved that the prisoner was not in his custody on the return day. Yet, without giving any opinion on that point, it is enough to say that this justification was open to the defendant under the 110th section of 1 & 2 Vict. c. 110. Now, is this in law a good defence? On this point it is argued that the warrant is void and insensible, inasmuch as it ordered the defendant to discharge the prisoner at a future period, which period having reference to the date of the vesting order, had at the date of the warrant elapsed. No doubt the warrant was ungrammatically expressed, but it must be taken to be only an extraordinary and unusual way of directing the defendant to discharge the prisoner forthwith in respect of the plaintiff's detainer, as well as other debts. It is an order to-day to do an act at a future day, which intervening space of time, by calculation, is found to have expired yesterday. That reduced into practice is an order to do the thing

at once. The gaoler could only look to the warrant, and if such was the true effect of that instrument, it did not signify what the form of the adjudication might be. This certainly seems to be a form that ought not to be adhered to. It is likewise contended that the defendant was bound to produce the body of the prisoner in obedience to the writ of *habeas corpus*. On this there can be no doubt that, as he was bound to discharge the prisoner, he had no authority to enforce his presence at a future day, and he could only make the return to the writ which he did make, namely, that he had him not in custody on the day named in the writ, inasmuch as he had been discharged by the warrant of a court of competent jurisdiction.

The rest of the court concurred.

Rule refused.

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v.
HUDSON.
—
1850.

Return to
habeas corpus—
Not guilty
by statute—
Discharge
warrant.

INSOLVENT COURT, DUBLIN.

March, 1851.

(Before Mr. COMMISSIONER BALDWIN.)

Re ALLEN.

Accommodation bill—Contracting a debt without probable means of payment—Evidence of fraudulent intent.

Accepting an accommodation bill at a time when the acceptor is unable to pay his debts contracted for valuable consideration, is contracting a debt without probable expectation of paying the same; and allowing the principal who received money for the bill to sell his chattels and leave the country without informing the parties who discounted the bill, will be deemed evidence of an original fraudulent intention.

THE insolvent was supported by *Creighton*, and opposed by *Phillips*, and *Levy*, for the Royal Bank, under the following circumstances:—It appeared that he resided with his brother in the county Meath, who was a farmer and grazier, which business the insolvent also followed. A bill for 700*l.* was drawn by his brother, and accepted by him, for which the Royal Bank gave cash. This bill was renewed once or twice, and on each occasion accepted by the insolvent, his brother being the drawer, and, whilst the last renewal was running due, the brother sold all his farming stock and chattels by auction, and absconded to America, without the insolvent ever having informed the bank of what he

Re ALLEN. was doing. The insolvent himself was then arrested on a fiat or judge's order, as it was apprehended that he intended to follow his brother to America; and he now came before the court to seek his discharge.

Accommodation bill—Means of payment—Fraud. The opposing counsel contended, first, that accepting an accommodation bill that the party was not prepared to pay, or at a time when he was unable to pay his other debts, was contracting a debt under the 68th section of the act (English analogous, 1 & 2 Vict. c. 110, s. 78), without probable expectation of payment; and, secondly, that omitting to inform the bank of his brother selling his chattels, and going to America, was evidence of an original intention to obtain the money fraudulently.

Creighton, for the insolvent, contended that the renewals of the bill ought to have led the bank to watch more closely, and inquire more particularly into the solvency of the parties. If they had not renewed the bill, they might have sued the brother, and recovered the amount before he left the country. The loss arose from their own laches: they were unable to trace a shilling of the proceeds of the bill into the possession of the insolvent, and his schedule had not been falsified, although there was a reference to the chief clerk for that purpose.

The COMMISSIONER was clearly of opinion, that all the facts of the case fully sustained the points of opposition that had been raised. The interests of trade and the protection of bankers required that an example should be made, and he would remand the insolvent for sixteen months from the date of the vesting order.

Insolvent remanded.

COURT OF BANKRUPTCY, DUBLIN.

April, 1851.

Re CLENDENNING.

Filing petition and schedule in Insolvent Court—Bankruptcy.

Where a petition and schedule are filed in the Insolvent Court, and after the expiration of two months, and before adjudication there, a commission of bankruptcy issues against the insolvent, the Bankrupt Court will not administer his estate and effects until the petition in the Insolvent Court is dismissed and the vesting order vacated.

THE 3 & 4 Vict. c. 107, s. 27 (English Act analogous 1 & 2 Vict. c. 110, s. 39), enacts that the filing of the petition of every person in actual custody, who shall be subject to the laws

concerning bankrupts, and who shall apply by petition to the said court for his discharge from custody according to this act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and that any commission of bankruptcy issuing against such person, and under which he shall be declared bankrupt before the time appointed by the said court, and advertised in *The Dublin Gazette*, for such prisoner to be brought up to be dealt with according to this act, or at any time within two calendar months from the time of making any such vesting order as aforesaid, whether upon the petition of any such prisoner, or the petition of any such creditor as aforesaid, shall have the effect of divesting the said real and personal estate and effects of such person out of the said provisional assignee; provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be declared bankrupt before the time so advertised as aforesaid, or within such two calendar months as aforesaid, &c. In the present case, although the insolvent had not been discharged by the Insolvent Court, his petition and schedule had been filed upwards of two months, when a commission of bankruptcy had been sued out against him. It appeared that there was chattel property to a considerable amount, which had not been taken out of insolvent's possession pending the proceedings in the Insolvent Court, and upon adjudication in the Bankrupt Court.

Creighton, for the petitioning creditor, asked His Honour, the Commissioner, if he would authorize the property to be removed by the messenger, and disposed of before the petition in the Insolvent Court was dismissed. The dismissal would, he supposed, be a matter of course, inasmuch as the bankrupt had not been discharged an insolvent; if he had been so discharged, the dismissal could only take place upon a rehearing: (*Re Walsh*, 17 L. T. 55.)

The COMMISSIONEE said, he would not permit the property to be disposed of, until the vesting order in the Insolvent Court was vacated, as he was of opinion that, inasmuch as more than two months had elapsed since it had been filed, and although the insolvent had not taken his discharge, still the Bankrupt Court could not administer his estate as long as it remained in force.

On a subsequent day, the bankrupt appeared in the Insolvent Court, when his petition was dismissed, as of course, and the vesting order vacated.

Re
CLENDENNING.

1851.

Petition in
insolvency—
Commission in
bankruptcy—
Dismissal.

COURT OF COMMON BENCH.

January 23, 1851.

SPURGEON (Assignee) v. TAYLOR.

Insolvent's goods—Seizure and sale—“After acquired property”—1 & 2 Vict. c. 110, s. 59—Bill of sale.

P., a tradesman in business, borrowed of T. the sum of 150l., giving as security a paper writing as follows:—“I, Edmund P., owe Daniel T. the sum of 150l., being money borrowed, and for which I hereby agree to pay interest at 5 per cent. to be paid by me at the end of six months from the present date, and to be further regularly paid at the expiration of each successive period of six months as it may become due from time to time, and until the said principal sum of 150l. shall be repaid by me the said D. T.; and as a security for the repayment of the said 150l., together with all arrears of interest which may become due, I hereby authorize and empower the said D. T. to take and hold possession of all or any household goods, shop fixtures, stock-in-trade, &c., in my house, situate, &c., and in the event of my failing to repay him the principal sum above mentioned, with interest thereon, then, and in that case, I hereby agree that the said D. T. shall sell and dispose of all my household furniture, shop fixtures, &c., in my house as aforesaid, and to appropriate the proceeds of the sale thereof, after deducting the expenses of such sale, to repay himself the said principal sum, and interest.” T. brought an action for the money lent, P. confessed judgment, and the sheriff, seven months after the date of the above set out paper writing, seized and sold all the goods he found on the premises. A few days afterwards P. petitioned the Insolvent Court, and a vesting order was duly made. The assignee brought this action to recover the amount received by T. for such goods as were not on the premises, at the date when the paper writing was made, but acquired by the insolvent subsequently:

Held, that, under this paper writing or agreement, the defendant was only entitled to the proceeds of such goods and effects as were on the premises on the day when the agreement was made.

THIS was a special case stated for the opinion of this court. The plaintiff was the assignee of one Edward Petty, who had taken the benefit of the Insolvent Debtors' Act, and the defendant was Petty's father-in-law, who had seized and sold the insolvent's effects within a month of his petitioning the Insolvent Debtors' Court, under an agreement given in consideration of money lent six months previously. The declaration was in *assumpsit* for money had and received. The pleas were, except as to 25l., *non-assumpsit*, and as to 25l. payment into court. The plaintiff was

duly appointed assignee of the estate and effects of the insolvent, Edward Petty, on the 7th December, 1847, under the statute 1 & 2 Vict. c. 110, and now claimed to be entitled to retain the verdict which had been entered for 56*l.*, upon the ground that the defendant had received that sum to his own use, the same being the proceeds of certain goods and chattels which had belonged to the insolvent, and which he alleged the defendant caused to be sold without having any legal title to do so. It appeared that Petty, the insolvent, was a hair-dresser, who had lived in Rotherhithe-wall, and who, shortly before the 15th February, 1847, took premises in Oakley-terrace, Old Kent-road, of which he had the possession on that day, but not the actual occupation. The insolvent married the daughter of the defendant, and after such marriage, and on the 15th February, 1847, the defendant lent to the insolvent 150*l.*, and at the time of such loan the insolvent signed and delivered to the defendant, as a security for the repayment of it, a paper writing, in the following terms:—

“ I, Edward Petty, of No. 2, Rotherhithe-wall, in the county of Surrey, hair-dresser, owe Daniel Taylor, of No. 35, Paradise-street, Rotherhithe, in the county of Surrey, gentleman, the sum of 150*l.*, being money borrowed by me of him, and for which I hereby agree to pay him interest hereon, after the rate of 5*l.* per cent. per annum, to be paid by me at the end of six months from the present date, and to be further regularly paid at the expiration of each successive period of six months as it may become due from time to time; and until the said principal sum of 150*l.* shall be repaid by me to the said Daniel Taylor, his heirs or assigns, and as a security for the repayment of the said principal of 150*l.*, together with all arrears of interest which may become due, I hereby authorize and empower the said Daniel Taylor to take and hold possession of all or any household goods, shop-fixtures, stock-in-trade, &c., in my house, situate and being No. 3, Oakley-terrace, Old Kent-road, in the county of Surrey; and, in the event of my failing to repay him the principal sum above-mentioned, with interest thereon, then and in that case I hereby agree that the said Daniel Taylor, his heirs or assigns, shall sell and dispose of all my household furniture, shop-fixtures, &c., in my house, situate as aforesaid, and to appropriate the proceeds of the sale thereof, after deducting payment of the expenses of such sale, to repay himself the said principal sum of 150*l.* and all interest remaining due. As witness, &c., 15th February, 1847.

“ Witnessed, &c.

EDWARD PETTY.”

The insolvent, at the time he gave this document to the defendant, had certain goods and effects on the premises in Oakley-terrace, and other goods and chattels belonging to him were afterwards taken to the same premises. The insolvent got into difficulties, and the defendant, on the 28th of August, 1847, commenced an action against him for the recovery of the money lent, and the

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insolvent consented to a judge's order that judgment might be signed in the cause, and such judgment was signed on September 3, 1847, and a warrant upon a writ of *fi. fa.* upon that judgment was delivered to an officer of the sheriff of Surrey for execution; and at the same time a paper writing, signed by the defendant's attorney, was delivered to the officer; and the officer afterwards, under the authority as well of the sheriff's warrant as of the paper writing, seized and took possession of all the insolvent's goods. That paper writing purported to authorize the sheriff's officer to enter and take possession of the goods, fixtures, and stock-in-trade belonging to the said Edward Petty, in Oakley-terrace, as well as those which had been upon the premises at the time the before-mentioned document was signed as those which were brought there afterwards, and the officer sold the whole of such goods and paid the proceeds thereof to the defendant, amounting to the sum of 56*l.*, for which the action was brought. No inventory or possession had been taken of any of the goods prior to the entry of the sheriff's officer. The officer seized on September 14, 1847. Of the sum of 56*l.*, the sum of 7*l.* 16*s.* 7*d.* was produced by the sale of the goods of the insolvent which were on the premises in Oakley-terrace at the time the agreement before mentioned was given by the insolvent to the defendant, and 48*l.* 3*s.* 5*d.* was produced by the sale of goods which had been brought to Oakley-terrace after the time the agreement was given. The insolvent petitioned the Insolvent Court on the 5th of October, and the vesting order was made on the 8th of October, 1847, pursuant to the statute. The question for the opinion of the court was, whether under these circumstances the plaintiff was entitled to recover any sum exceeding the amount of 25*l.* paid into court? If the court should be of opinion that the plaintiff was entitled to recover any sum beyond 25*l.*, a verdict was to be entered for the plaintiff for the amount he might be held entitled to recover; but if the court should be of opinion that the plaintiff was not entitled to recover any sum beyond the 25*l.* paid into court, a verdict was to be entered for the defendant.

Gosnell (with him *Lush*), for the assignee.—The defendant had waived the judgment signed in this case by seizing the goods under *fi. fa.*: (*Jacobs v. Latour*, 5 Bing. 130.) (a) There was here, under the instrument given by Petty, a mere right to hold conveyed to the defendant. I shall argue that this document is inoperative for passing after-acquired property. [Byles, Serjt. (interposing.)—It is for the after-acquired property that the plaintiff goes: we say that no property passes under the paper.] This document does not purport to pass, or give any authority to pass, after-acquired property: (*Tapfield v. Hillman*, 6 Scott, N. R. 967.) In the first place this instrument gave no power to the defendant; secondly,

(a) That case decided that a party who, having a lien on goods, causes them to be taken in execution at his own suit, loses his lien thereby, although the goods are sold to him under the execution, and are never removed off the premises.

if it did, it would be inoperative as regards after-acquired property: (*Gale v. Burnell*, 7 Q. B. 850.) Next, I contend that there is no difference between an assignment and an authority to take. Such an instrument is no charge till it is executed; and it operates first when the goods are seized. The stat. 1 & 2 Vict. c. 110, s. 59, makes such an assignment void. If this document should be upheld, the statute will be contravened, and much injustice to creditors would be the consequence. The plaintiff is entitled to the sum of 23*l.* 3*s.* 5*d.* in addition to the sum paid into court; it is submitted, therefore, that the verdict should be entered for the plaintiff for that amount.

Prentice (*Byles*, Serjt. with him), for the defendant.—It is by no means so clear as has been assumed, that this agreement is fraudulent and void. The real point is whether the defendant was entitled to take property brought to the house after the date of the agreement. It is not contended that the instrument operates as a conveyance, because it is not under seal, but it operates as a power coupled with an agreement to take the property. It will be seen by the instrument that the money was to be repaid to the defendant at the end of six months. It is, therefore, submitted that the power to take and sell was not to operate till the end of the six months; for the defendant was only to have a right to enter on default of payment. It could not be that the parties intended that entry and possession should be had at once, for Petty, the insolvent, was then in his trade of a hair-dresser, which would be put an end to at once by such a proceeding. It will be observed that power is given to the defendant "to take and hold possession of all household goods, shop-fixtures, *stock-in-trade*," &c. The mention of the last words is material, as showing that the parties contemplated future-acquired goods, because "*stock-in-trade*" consists of goods continually coming in and going off the premises. On close examination it will be seen that the judgment in the case of *Tapfield v. Hillman*, cited for the plaintiff, is in the defendant's favour: (*Lunn v. Thornton*, 1 C. B. 379.) It has never yet been decided that a power may not be given to take after-acquired property. With these considerations before the court, it is submitted the verdict should be entered for the defendant.

JERVIS, C. J.—The court is not called upon in this case to determine whether a debt of this kind may be charged upon future-acquired property; nor is it necessary to say whether a party may or may not give a power to be acted upon in future to seize all his property. This is simply a question of the construction of this paper, and, so regarding it, I am of opinion that it amounts to an agreement or authority to take such household goods, *stock-in-trade*, and effects only, as were on the premises at the day when the parties entered into the agreement. It is apparent, upon reading the document, that such is the meaning of it, for the goods are to be taken as security for the repayment of the principal money advanced, with the arrears of interest that

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may become due. They are to be taken as a present security in the event of future nonpayment. There is a present intention to take, and a future contemplation of selling; and if so, and the agreement was intended to operate immediately, it must have been upon goods upon the premises at the date of the agreement. I think, therefore, that the plaintiff is entitled to recover the value of the property acquired afterwards, and that a verdict must be entered for him for that amount.

MAULE, J.—I think this agreement was meant to apply to the property in existence at the time it was made, and that it does not purport to comprehend any future property. This is the ordinary construction of instruments of this kind, and the language of this instrument has nothing out of the common, but I think it would be doing a thing much out of the common to decide that a document of this kind related to after-acquired property. Some little difficulty in executing the agreement will arise from this construction, so far as the stock-in-trade is concerned; but that may well be consistent with the construction we put upon it, because it is not necessary to the construction being the true construction that it should enable the parties entering into the agreement to act upon it at all times with reference to all the subjects with which it may be acted upon, and yet to be quite perfect with respect to everything which may fall within the terms of it. I mean this: there is no doubt upon this document that the creditor might have immediately taken all the fixtures, stock-in-trade, and other effects, and have sold them (the six months having elapsed) upon default being made. In that event, with respect to all the subject-matter of the agreement, he would have been able to execute it completely without any inconvenience or difficulty; whereas, if, instead of doing that, he allowed the trade to be carried on for some time, and afterwards seized, he might be placed in a good deal of difficulty, if it should be held that property on the premises falling within the description in the instrument was the only property granted. There might be a practical difficulty as to the amount of the stock-in-trade at the time the instrument was made. If there were stock-in-trade to a large amount, the difficulty might be avoided by at once taking possession; but if the creditor did not do that, then the sort of difficulty mentioned would arise; but it might be that the stock-in-trade was of so trifling a nature that it was not worth his while to trouble himself about it, and from the nature of the trade I think myself at liberty to conjecture that it was so in this case. The substance of the security, therefore, was probably the furniture, the fixtures, and the things specifically mentioned in the selling power, the stock-in-trade being only one of those which were there included in the *et cetera*. If this be so, it removes the difficulty, or shows that it does not exist as to what would otherwise be the plain, simple, and ordinary construction of this instrument, viz., that the property on the premises mentioned in the document meant the property on the premises at the time the

agreement was entered into. I think, therefore, this instrument did not pass the after-acquired property, and that the plaintiff is entitled to the proceeds of that property.

CRESSWELL, J.—I am of the same opinion, but I by no means mean to be bound to the opinion that if this instrument had been differently constructed, and if we had thought that it was the intention of the parties to include property acquired afterwards, that it would have been valid against the assignees of the insolvent. That is an important question, and if it were discussed it may be that we should hold such an instrument would be within the operation of the clause in the Insolvent Debtors' Act, which makes void, as against the assignees, property transferred within a certain time. Neither do I mean to express an opinion whether an instrument of this sort might not be constructed so as to pass future-acquired property; I only say that I think this instrument contemplates a present seizure and a subsequent sale on failure to pay. This appears from the language used. It is first, to "take and hold possession of," an expression applicable only to holding for some time. It is not to "take and sell" as continuous acts, but an interval is assumed in which possession is holden, though no time is fixed, and then the authority is to sell "in the event of my failing to pay." I think, therefore, the plaintiff is entitled to the sum he here seeks.

WILLIAMS, J.—I am of the same opinion, and, with the same reservations as my brother Cresswell, I think we ought not to extend this instrument to property acquired by the insolvent after the date of it.

*Verdict entered for the plaintiff for 23*l.* 3*s.* 5*d.**

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COURT OF COMMON BENCH.

April 17, 1851.

RIDSDALE *v.* LATOUR.

*Execution—Discharge of insolvent prisoner—Plaintiff dead, leaving no
next-of-kin.*

In the year 1847 defendant was taken in execution, and in July, 1849, the plaintiff died in insolvent circumstances. On the 19th February, 1850, the plaintiff's will was proved, his widow being executrix. In the following August the widow died intestate and without issue; and though a diligent search had been made, no personal representative or next-of-kin could be found. The court declined granting a rule for the defendant's discharge, but acceded to a proposal of the defendant that the case should be referred to the Master to inquire into and report upon it at the defendant's expense, power being given him to advertise for next-of-kin.

BALL moved for a rule, to show cause why the defendant herein should not be discharged out of custody. The affidavit disclosed the following facts:—The defendant was taken in execu-

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tion and imprisoned at the suit of the plaintiff in the year 1847, for the sums of 647*l.* and 112*l.* respectively. On the 18th of July, 1849, the plaintiff died, being then in insolvent circumstances. His will was proved on the 19th of February, 1850, his widow being executrix. In the following August the widow died intestate, without children; and though diligent search had been made, no personal representative of the parties nor any next-of-kin could be discovered. This gentleman remaining in custody under these circumstances, it is submitted the present motion should be granted. (*Broughton v. Martin*, 1 Bos. & Pul. 176.) In that case the Court discharged a defendant out of custody who was in execution at the suit of a plaintiff deceased, on whose part no will had been proved or administration granted, and whose family declined interfering. The difference is, that in the present case there are no next-of-kin to serve the rule on. (*Parkinson v. Horlock*, 2 New Rep. 240; *Gore v. Wright*, 1 Dowl. N. S., 864; *Taylor v. Burgess*, 16 M. & W. 781; *Camp v. Pope*, 14 L. T. 204.) These are all the cases in favour of or adverse to this application. The case of *Camp v. Pope* is an authority which supports this motion. There the court granted a rule for the discharge of the defendant, though the affidavit contained no statement of the plaintiff's death. Here we have not only evidence of the plaintiff's death, but also of administration. [WILLIAMS, J.—What a singular thing it is that here are two persons, neither of whom has any next-of-kin.] It is. [CRESSWELL, J.—There is one good reason on the face of your affidavit why the court should not interfere. It is sworn that Ridsdale died insolvent. The defendant is imprisoned for a large sum of money, and the plaintiff's creditors may wish to detain him till payment.] The defendant is wholly unable to pay; he might as well be asked to clear off the national debt as the sum for which he is imprisoned. We do not even know who the creditors are. Perhaps the court will allow the case to go before the Master? [JERVIS, C. J.—You propose that the Master should inquire into the case, and report upon it at your expense?] Yes.

JERVIS, C. J.—Let the application be referred to the Master to inquire into the case, and report upon it at the defendant's expense; power to be given to the Master to advertise for next-of-kin, and make his report to this court.

Rule accordingly.

COURT OF COMMON BENCH.

*April 26, 1851.**Ex parte WILLIAM VIOLETT.*

*Habeas corpus—Insolvent debtor—1 & 2 Vict. c. 110, ss. 76, 78—
Validity of order of discharge.*

A prisoner under the Insolvent Debtors' Act, 1 & 2 Vict. c. 110, s. 76, was ordered by the commissioner to be discharged in respect of all his debts except four, at the end of six months; and under sect. 78 of the same statute, he was ordered to be discharged at the end of sixteen months in respect of the four excepted debts:

Held, that whether the commissioner had or had not power to adjudicate a further imprisonment under the 78th section, still he had not released the prisoner as to the four excepted debts, and therefore as the detainers with respect to them remained in force, this court could not discharge him.

LU SH moved for a writ of *habeas corpus* to discharge one William Violett, a prisoner, out of the custody of the keeper of the Queen's prison. The affidavits stated that the prisoner, an insolvent debtor, had petitioned on the 26th of October, 1850, under the 1 & 2 Vict. c. 110, for his discharge, and on the 28th of October the vesting order was made, and on the 3rd of March, 1851, an order was made by the commissioner, for the prisoner's discharge in respect of all debts except four, due to different persons, and particularly described in the order, so soon as he should have been in custody at the suit of one or more of the creditors for those debts six months computable from the date of the vesting order; and the order proceeded to state that forasmuch "as it appears to the said court that the said prisoner has contracted the said four last-mentioned debts severally by means of a breach of trust, it is adjudged and ordered that he, the said prisoner, shall be discharged from custody and entitled to the benefit of the said act, as to the several last-mentioned debts, so soon as the said prisoner shall have been in custody at the several suits of the said four creditors for the same debts respectively, for the period of sixteen calendar months, to be computed from the time of making such vesting order as aforesaid." The six months having expired, and the prisoner being still in confinement, the detainers at the suit of the four creditors being enforced against him, it is sought of this court to give him relief, and order his discharge. The 76th section of 1 & 2 Vict. c. 110, empowers the commissioner to adjudge that the prisoner be discharged forthwith, or so soon as he shall have been in custody at the suit of one or more of the creditors, as to whose debts such discharge is so adjudicated, for a period not exceeding six months from the making of the vesting order. And by the 78th section it is enacted,

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discharge—
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“that if it appears that the prisoner has contracted any of his debts fraudulently, or by breach of trust, then the commissioner may adjudge that the prisoner be discharged forthwith, except as to such debts; and as to them, that he be discharged so soon as he has been in custody at the suit of the creditor for the same, for a period not exceeding two years, to be computed as aforesaid.” Here the commissioner has put together the 76th and 78th sections of the statute, and has made an order for release at the end of six months from the general debts, and at the end of sixteen months in respect of four specified debts. He cannot do this. This statute does not contemplate the detention of the prisoner for two separate periods, by two classes of persons—the general body of creditors, first—and then by particular persons in respect of specified debts. The period of six months having expired, the prisoner cannot be liberated, for by ordering imprisonment and release under the 76th section, the commissioner has exhausted his power, and is *functus officiis*. [CRESSWELL, J.—If a debtor is before the court for six debts, and the commissioner says, “as to three of the debts you shall be discharged at the end of six months,” and as to the remainder, at the end of ten months, do you say the prisoner is discharged at the end of six months?] Yes. The adjudication for the first three debts relieves the prisoner as to the others. The whole order is bad. [JERVIS, C. J.—If that be so, why should not the prisoner remain in custody?] The exception as to the four debts is evidently bad, and the court should strike it out from the order. The commissioner having acted on the 76th section, the effect of which is to discharge the prisoner altogether, the court will strike out from the warrant the illegal part ordering further imprisonment. The commissioner having exhausted his power, and the six months’ imprisonment being completed, it is submitted the prisoner is entitled to his discharge.

JERVIS, C. J.—It is unnecessary to decide whether the commissioner was right in adjudicating under the 76th and 78th sections upon both classes of debts. It is plain that, on the adjudication and the judgment, the prisoner, as to the four excepted debts, is not discharged, because the order says that he shall be discharged, “except as to the four specified debts,” at the end of six months; and if the first part of this adjudication is to be regarded as a full and complete exercise of the commissioner’s authority, the detainers as to those four are still in force against the prisoner, and we cannot release him. If we are to strike out anything from the order, it is quite as simple to strike out all the words subsequent to the words “so soon as the said prisoner shall have been in custody,” &c., as that which we have been asked to strike out.

CRESSWELL, J.—I entirely agree. It is impossible to hold that because the commissioner says, “you shall be discharged from debts one, two, three,” he is to be released as to debts four, five, and six.

WILLIAMS and TALFOURD, J.J., concurred.

Rule refused.

INSOLVENT COURT.

April 15, 1851.

(Before the CHIEF COMMISSIONER REYNOLDS.)

PROTECTION CASE.

*Re JOHN FREEMAN EDWARDS.**Petition—Name of insolvent.*

All the names in which an insolvent has contracted debts must be set forth in his petition.

THIS insolvent had accepted a bill in August, 1850, in the name of John Edwards. The petition was filed on the 22nd March, 1851.

Nichols objected that the insolvent should have been described by all the names in which he had contracted debts.

Horry for insolvent.

The CHIEF COMMISSIONER dismissed the petition.

COURT OF COMMON BENCH.

*May 6, 1851.**HAMBER v. HALL.*

Insolvency—Liability of creditors' assignee for fees of messenger—5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96.

Where there is no express contract for the payment of the messenger's fees, the creditors' assignee in insolvency under 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4, is not liable for them.

THIS was an action of *assumpsit*, the declaration containing counts for work and labour, money paid, money had and received, and on an account stated.

Plea—Non-assumpsit.

The cause was tried at the sittings after Michaelmas Term last,

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before Jervis, C. J., and a verdict taken for the plaintiff for 259*l.* 10*s.* and interest, subject to the opinion of the court on the subjoined special case.

The plaintiff was, on the 26th of May, 1847, and had ever since been, a messenger of the Court of Bankruptcy in London, attached to the court of Mr. Commissioner Goulburn. The defendant was a solicitor and banker at Ross, in Herefordshire, carrying on business as a solicitor, in partnership with Mr. Minett, under the firm of "Hall and Minett." On the 26th of May, 1847, one John Mathewman presented a petition for protection from process to the said Court of Bankruptcy in London, and that petition was duly allotted to Mr. Commissioner Goulburn. On the 27th of May, 1847, George Green was duly appointed official assignee of the estate and effects of the said John Mathewman, under the said petition, and so continued until his death, on the 21st of October, 1849. On the 10th of November, 1849, William Pennell was duly appointed official assignee, in the stead of the said George Green, and so continued until the plaintiff was discharged of possession, as hereinafter mentioned. On the 12th of June, 1847, the defendant, who was a creditor of the said John Mathewman, was duly chosen creditors' assignee of the estate and effects of the said John Mathewman, under the said petition, and duly accepted the appointment, and has ever since been and acted as creditors' assignee. On the 27th of May, 1847, the plaintiff, as such messenger as aforesaid, by virtue of a warrant under the hand and seal of the said commissioner, directed to the plaintiff as such messenger, duly seized and took possession of certain goods and effects in and upon a certain colliery belonging to the said John Mathewman, or wherein he was interested, situated at Oaken and Churchway Levels, St. Briavles, in the Forest of Dean, and by himself and his assistants had and retained possession of the said goods and effects until he was discharged from such possession on or about the 4th of March, 1830. The said John Mathewman had no other property besides his goods and effects before mentioned, and his interest in the said colliery. The said petition is now filed of record, and remains in full force and effect in the said Court of Bankruptcy. A final order in the matter of the said petition was made on the 1st of April, 1848. The plaintiff's bill of charges and disbursements, as such messenger under the said petition, has been taxed by the proper officer of the Court of Bankruptcy, and allowed at the sum of 259*l.* 6*s.* 9*d.* Of this sum 251*l.* 7*s.* 3*d.* is due in respect of services subsequent to the date of the defendant's appointment as creditors' assignee. The residue is in respect of services before such appointment. No assets have ever been received by the official assignee, or by the defendant, out of the estate of the said John Mathewman. The defendant never was upon the colliery, nor did he ever interfere with the said plaintiff, or with his possession of the said colliery, or the goods and chattels of the aforesaid John Mathewman thereon, except so far, if at all, as the same may be inferred from the cor-

respondence and affidavit set out in this case. [The correspondence only showed that the defendant knew that the plaintiff was employed on the colliery as messenger, and had communications with him relative to the property.]

The special case stated the questions for the court to be—Whether the plaintiff was entitled to recover the whole, or any, and, if any, what part of the said bill; and whether with or without interest; and if the court should consider him so entitled, the verdict was to be entered for such amount as the court should direct; if not, the verdict for the plaintiff was to be set aside, and a nonsuit entered.

Lush, for the plaintiff.—The question for the consideration of the court is, whether the plaintiff is entitled to recover the whole or any part of this bill from the creditors' assignee, under statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, in like manner as he could have recovered from the assignee in bankruptcy previous to those acts. The cases on this subject are, *Burwood v. Felton* (3 B. & Cr. 43); *Hamber v. Purser* (2 Cr. & M. 209); *Robson v. Jonassohn* (7 M. & Gr. 351); and a case in equity, *Ex parte Hartop* (9 Ves. 109.) In the last case, the liability of the assignee in bankruptcy was distinctly recognised. [CRESSWELL, J.—The case of *Robson v. Jonassohn* shows that the messenger is the servant of the assignee; now if the assignee does not need his services, he cannot be liable.] There are no other cases on the subject, but those cited are sufficient to support the plaintiff's case: they decide that the messenger is the servant of the assignee, and the assignee is liable to pay him. [JERVIS, C. J.—The assignee finds a messenger in possession; he may, but does not, turn him out, and is therefore liable for continuing him. What date do you fix for the liability?] The assignee is liable from the date of his appointment. These cases, no doubt, are all anterior to the Bankruptcy Act (1 & 2 Will. 4, c. 56, s. 22), which appoints an official assignee; but that makes no difference. The position of the creditors' assignee is little altered; his duty is to realise assets, and pay over the proceeds to the official assignee. By the 22nd section of the 1 & 2 Will. 4, c. 56, official assignees are appointed, and one is to be assignee of each bankrupt's effects, together with the creditors' assignees, "and all personal estate, and the rents of real estate, and the proceeds of sale of all real and personal estate are to be possessed and received by the official assignee alone," and there is a proviso that before the appointment of the creditors' assignee the official assignee is to be deemed to all intents and purposes the sole assignee of the bankrupt's estate and effects. This means that whilst the title to the property shall vest in both, the duties of the official assignee are limited to receiving the proceeds. [CRESSWELL, J.—No; no. JERVIS, C. J.—You say the creditors' assignee has the sole management of the estate. Under what section is that?] The Insolvency Act (5 & 6 Vict. c. 116, s. 1), says that the estate and effects of the petitioner are, on the presentation of the petition, to become vested in the official

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assignee, who may forthwith take possession of so much as may be obtained without suit, and is to hold and stand possessed of the same in like manner as official assignees under the Bankruptcy Act. The 7th section says that "after making the final order, the whole estate shall vest in the official assignee and the creditors' assignee." By the 7 & 8 Vict. c. 96, s. 4, the terms are altered, for it says that the property shall be possessed and received "by the official assignee alone." By the 10th section it would seem that the official assignee has not power to sell without the authority of the commissioner. [CRESSWELL, J.—Not while he is alone.] The 13th section of 5 & 6 Vict. c. 116, is important. Under this the judges had power, amongst other things, to make rules and regulations as to the duties of assignees, and they, in pursuance thereof, made such order on 1st November, 1842. The 11th order is pertinent here. The creditors' assignees generally deal with the property in bankruptcy; and it was in the power of the judges to order that in insolvency cases the creditors' assignees should look after the estate. [CRESSWELL, J.—The order for the dismissal of the messenger came from the creditors' assignee, at the instance of Pennell, the official assignee. He gave a clear order of dismissal.] The order for dismissal was sent to the plaintiff, not by the official assignee, but by the creditors' assignee, the defendant. The defendant should have said at once, "I am not liable, you must not look to me." [JERVIS, C. J.—You say the defendant had power to dismiss the messenger; where is your authority for that?] He had it in the capacity of creditors' assignee, to which it is incident. The official assignee had no power to direct or control the sale of the property; it would, therefore, be most unjust to hold him liable to the expense of the messenger, however long the creditors' assignee may please to keep him in possession.

Channell, Serjt. (with him *Bovill*), for the defendant.—The correspondence shows that the messenger was not put into possession by the creditors' assignee; and the statement that on his signature to an order from the official assignee for the dismissal of the messenger the latter should be discharged, does not prejudice the creditors' assignee. That was all that he did in the matter from beginning to end. Of himself, he had no power to dismiss the messenger. The messenger was employed under a warrant of the court. As to the question upon the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, the effect of the 1st section of the former was considered in *Sayer v. Dufaur* (11 Q. B. 325), where it was held that the right of action is in the official assignee, and not in the petitioner, after petition and before final judgment. The operation of that section is to give possession of the property to the official assignee, though, on the appointment of the creditors' assignee, the property for some purposes vests in both. The 7 & 8 Vict. c. 96, does not repeal the former act, but was passed for the purpose of amending it. In the 10th section expressions are found which would raise an inference that, after the creditors' assignee is appointed, the official assignee and himself are on the

same footing; but that will not prejudice the defendant's case. Neither the correspondence nor the facts are sufficient to show that there was any contract between these parties; and it is therefore submitted a nonsuit should be entered in this case.

Lush, in reply, stated that he would leave the question on the statute in the hands of the court, and he limited his answer to the facts.

JERVIS, C. J.—I am of opinion that the defendant in this case is entitled to the judgment of the court. Although in the textbooks it is asserted generally that the assignees are liable, under the old law, to pay the messenger, there is no clear authority to that effect since the stat. 1 & 2 Will. 4, c. 22; therefore, every case will be found to resolve itself into a question of contract between the parties. Under the old law, when the assignees were entitled to the whole property, it was their duty to manage it; and if they found a man in possession, and knew he was doing acts within their duty, they constructively recognised and adopted those acts. Here there is no evidence of an express contract between the parties. The messenger was employed by the official assignee, and it has been contended that the creditors' assignee had knowledge that he was so employed. The question then arises, now we are called upon to imply a contract, what are the duties of a trade assignee? The question is on the construction of 5 & 6 Vict. c. 116, s. 1; the 7 & 8 Vict. c. 96, s. 4; and 1 & 2 Will. 4, c. 56, s. 22. What is the effect of 1 & 2 Vict. c. 116, s. 1? It provides that, whereas an assignment was formerly necessary, adjudication without any assignment vests the property in the official and creditors' assignees, but the personal property is to be in possession of the official assignee. The creditors' assignee is not in possession, and receives nothing. Here the contract is, if any, to pay, if there are assets; and it is contended he is to pay without assets. How could it be so? He would have to pay first, and then have his action for money had and received. We have to decide whether there was a contract in this case between the parties; it seems to me that there existed no contract, such as would make the defendant liable, either by adoption or otherwise.

CRESSWELL, J.—I am of the same opinion. The action is for work and labour done at the request of the defendant. Now, undoubtedly, there is neither an express contract, nor an express promise to pay. Was the work and labour done for the defendant, or was it not? The work done was keeping possession of the property. Was the keeping possession an act done for the trade assignee? No; for the property was in the official assignee. The work, therefore, not being done at the request of the defendant, he cannot be held liable to pay. The *postea*, therefore, must go to the defendant.

WILLIAMS, J.—I am also of like opinion. There is here no evidence whatever of a contract, express or implied, under which the plaintiff was employed by the defendant. The messenger was not employed on the retainer of the defendant.

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TALFOURD, J.—I am of the same opinion. The messenger was in possession before the appointment of the defendant as trade assignee. There has been no such interference on the part of the defendant as would make him liable for the expenses of the messenger.

Nonsuit to be entered

INSOLVENT COURT.

May 9, 1851.

(Before Mr. COMMISSIONER LAW.)

Re RICHARD BRITNELL.

Friendly arrest—Fictitious debt.

Where, upon a friendly arrest, the debt upon which the insolvent is arrested is fictitious, and concocted between the parties for the purposes of the arrest, the court has no jurisdiction.

COOKE opposed.
Nicholls for insolvent.

Cooke submitted that there was a friendly arrest, and no debt. The insolvent admitted, in his examination, that the I O U upon which he was arrested was given for the purpose of the arrest.

Nicholls said that the attorney seemed to have supposed, that because a friendly arrest where there was a debt might be no ground of opposition, a friendly arrest where there was no debt might also be sustained.

Mr. COMMISSIONER LAW.—I have no jurisdiction.

Petition dismissed.

INSOLVENT COURT.

May 14, 1851.

PROTECTION CASE.

*Re HENRY HERRICK.**Costs of opposition.*

A petition being dismissed at insolvent's request, the costs of opposition were allowed out of money in court belonging to the estate.

THIS insolvent, an officer of the late Palace Court, came up upon an adjourned examination upon his interim order for his final order.

Cooke opposed on behalf of a creditor.—The petition was filed so long ago as February, 1849, when the insolvent proposed to set aside 50*l.* a-year for his creditors. He, under that arrangement, had paid into court 25*l.* as one half-year's instalment of the amount. The Palace Court being abolished, the payments ceased. The case stood over from time to time to await the result of the application to the Lords of the Treasury for compensation for the loss of his situation. In January, this year, the insolvent had received 53*l.* as the amount of one year's compensation. He had not inquired whether he was to receive 53*l.* a-year regularly. He was unable to obtain a situation, and had a wife and four children to support. He was not willing to offer anything to his creditors. The insolvent asked for the dismissal of his petition. *Cooke* had no objection, but doubted whether, as there was money in court, it could be done.

The CHIEF COMMISSIONER thought he had the power to dismiss the petition, granting upon *Cooke's* application the costs of opposition out of the 25*l.* in court.

Petition dismissed; costs of opposition allowed out of money in court.

INSOLVENT COURT.

*May 30, 1851.**Re JOHN UPTON.*

(Before the CHIEF COMMISSIONER.)

Assignee—Misconduct.

The court will order an assignee to make good any deficiency in an insolvent's estate and effects caused by the mismanagement or misconduct of the assignee.

THIS case had been repeatedly before the court, and fully argued by counsel. The facts are sufficiently stated in the judgment, which was delivered by the court to-day after time taken to consider.

The CHIEF COMMISSIONER said, this man was a cotton spinner at Sedburgh, in Yorkshire, and being in prison for debt on the 6th of April, 1848, filed his petition on the 15th April, and obtained his vesting order on the 18th. He was heard at York on the 1st July, 1848, and was discharged forthwith. Mr. John Swainson, creditor 71, and Mr. William Wearing, creditor 70, were appointed assignees, and their appointment is dated 12th July, 1848. Among other property possessed by the insolvent was his interest in a mill called Birks Mill, of which he held the lease for the unexpired term of eight years and a half, and the machinery on that mill: and in another called Milthorpe Mill. On the 16th March, 1849, Mr. Wearing files his account, and on the 12th April, Mr. Swainson files his. Mr. Wearing's account was audited on the 29th of March, 1849, and a report was made to the court, before the late Mr. Commissioner Harris. This report was excepted to, and two matters only were referred back to the examiner, namely, the disposal of the insolvent's property at Birks Mill and at Milthorpe Mill; and it is upon these two particulars that an immense mass of affidavits has been filed, and very lengthened and able arguments have been addressed to the court. It appears that there was an intention to dispose of the property at Birks Mill by public auction, and the 13th December, 1848, was the day appointed for the sale. On the morning of that day, a conference took place between the two assignees, a Mr. Fisher, and a Mr. Scot, and Mr. Holmes, landlord, about withdrawing the sale from the public to dispose of the same to Mr. Holmes, the landlord; and ultimately it was agreed that Mr. Holmes should purchase it at the sum of 511*l.*; that out of this Mr. Holmes should deduct his

claim for rent of a year and a half, and the balance should be paid by three bills, drawn on and accepted by Holmes. This was done, and the three bills so accepted were deposited with Mr. Swainson, and were ultimately paid, and the public auction was stayed. The creditors object to this proceeding, as a very inadequate sum for the machinery, and that the whole was a scheme to give to Mr. Wearing the mill at a very insufficient value. There had been a valuation of this property by five different persons: a Mr. Fisher at 1,266*l.*; a Mr. Savage, 1,228*l.*; a Mr. Maudesley, 1,128*l.*; a Mr. Jackman, 786*l.*; and a Mr. Tomlinson, 706*l.* Mr. Fisher's valuations had been made on the supposition of the machinery remaining on the premises; 306*l.* being his value if such were removed. It is not stated upon what principles these other gentlemen made their respective estimates, but it is obvious that the 511*l.* ultimately agreed upon and paid was very far short of the value of the lowest estimate. Now, it is objected to the *bond fides* of this proceeding that really this was a scheme to give this property to Mr. Wearing. It may assist our inquiry to note the duties of assignees—first, under the provisions of the 1 & 2 Vict. c. 110; and secondly, in analogy with the kindred system of bankruptcy. By sect. 47 of the statute it is enacted “that the assignees shall, with all *convenient speed* after their appointment, use their best endeavours to receive and get in the estate and effects of the prisoner; and shall, with *all convenient speed*, make sale of all such estate and effects.” Now, the repetition of the two words “convenient speed” in this short sentence seems to me to point out the duty of assignees in this respect very emphatically. The 62nd section of the same act, after stating that the provisional assignee shall keep his accounts from day to day, provides that every other assignee, at the end of three months *at the furthest* from the date of his appointment, shall file his accounts and proceed to dividend; and the following section, the 63rd, enumerates several circumstances in which the court may charge an assignee with twenty per cent., and the being guilty of *waste or mismanagement* of the estate is among the provisions of that section; and further, assignees are, by sect. 65, expressly made officers of the court, and liable, as such, to its control. Now, the assignees in this case did not file their accounts within the three months, but did in about six months from the date of their appointment, and thereby an injury was inflicted on the creditors; for there was owing to Mr. Holmes, the landlord of the Birks Mill, a year's rent on the 7th April, 1848, and another half-year was running on; had the assignees taken to the lease, eight years-and-a-half, the landlord would have been entitled to a year's rent only, and to be a creditor for the other half-year, when due in November following, but by the arrangement for sale to Holmes on the 16th December following, Holmes was allowed to take in full a year-and-a-half's rent, which was deducted at the time out of the 511*l.* that Holmes was to give for the property at Birks Mill. I pause at this part of the case to remark that there is a great number of affidavits connected

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with the actual levy of the defendants; there is a distressing contradiction as to the mode in which this was effected; but I do not think it necessary to enter into this matter, for I do not see how the property could have been disposed of without the landlord being paid the 120*l.*, the arrears then due for the rent. The second, and perhaps the most important part of this inquiry then, which arises, is Mr. Wearing, the assignee of Upton's estate, in the possession of this mill, and how and when did this occur. *December 16th* was the day on which the arrangement was made with Mr. Holmes the landlord, and within a week, viz., on the *20th of December*, Mr. Wearing writes to a Mr. Hayhurst thus:—"I have taken the Birks Mill, formerly worked by Mr. Upton, and bought the machinery, and have to pay for them on Saturday, and I am a little short of cash." Now this letter called upon Mr. Wearing for an explanation, but not one word does he say in an affidavit *after* this allegation touching this matter. Mr. Holmes, the landlord, makes no affirmation respecting it. I disregard, therefore, contradiction as to alleged representations of Wearing on this matter. To my mind, there is no getting out of this statement in this letter; yet I would just note the concluding part of an affidavit of Mr. Swainson, sworn the 16th of January, 1850. After stating the mode of the arrangement with Holmes, it proceeds as follows. (The learned Chief here read the extract.) Now to this part of Mr. Swainson's affidavits, Mr. Wearing makes no reply, nor offers denial or explanation. I conclude, therefore, that Mr. Swainson's statement is true, and that Mr. Wearing, with a full knowledge of what he was doing in his character of assignee of this estate, has subjected himself to make good whatever deficiency has occurred. Now, in bankruptcy, the assignees cannot bid, nor employ any one to bid for them, at the public sale of the bankrupt's estate; they cannot possess themselves of the bankrupt's property by purchase or otherwise; the rule of the court being inflexible and uniform against the transfer of any part of the bankrupt's estate, either to assignees or commissioners. This principle is clearly set forth in all treatises on this subject, and is to be found in Archbold's Practice, p. 377, and in Eden's Treatise, 203 to 307, and Montague and Ayrton, 323. I think that the evidence in the case before me justifies and demands the decision of this court, that Mr. Wearing, with the assistance of Mr. Holmes, has got this Birks Mill for himself; and therefore is liable to make good to the estate whatever it may have suffered from Mr. Wearing's conduct. But how is that to be discovered? Mr. Wearing will not tell us, and Mr. Holmes is silent. In resorting, therefore, to what we have, we look at the different valuations of this property:—

1. Fisher	...	...	...	£1,266	0	0
2. Savage	...	...	...	1,228	0	0
3. Maudsley	...	...	...	1,128	0	0
4. { Jackman	...	...	...	786	0	0
Tomlinson	...	...	...	706	0	0
				£5,114	0	0

5,114*l.* total amount of valuations, divided by 4, gives 1,278*l.* and a fraction. Deduct 500*l.* H. paid, leaves 778*l.*

The order made by the court was,—“Upon reading the report of Edward Ingpen, gentleman, one of the examiners of the said court, it is ordered that the said report be confirmed to the extent of ordering Mr. Wearing to pay 700*l.* into court, and that the case concerning the Milthorpe Mill be referred to Charles Dance, gentleman, an examiner of the said court, for further evidence; and it is ordered that the said sum of 700*l.* be paid into court by the said Mr. Wearing not later than six weeks from the date hereof.”

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JUDGE'S CHAMBERS.

July 3, 1851.

(Before Mr. JUSTICE WILLIAMS.)

TURNER AND ANOTHER *v.* WILKS.

Protection Statutes—Imprisonment of debtor beyond twelve months—Discharge of insolvent.

By the 7 & 8 Vict. c. 96, s. 28, it is enacted, “that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition.”

The Insolvent Debtors' Court refusing to discharge an insolvent petitioner who had been in custody more than twelve months:

Held, by Williams, J., after consulting Parke, B., that a judge at chambers may discharge him.

THE insolvent, the defendant in the action, filed a petition for protection under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, in the Court for Relief of Insolvent Debtors, and came up for his examination before Mr. Commissioner Law, on the 19th of April, 1850, when he was opposed by the plaintiffs in this action, and a day was named for making the final order. On the last-named day the insolvent was again opposed, and the learned commissioner (Mr. Law) adjourned the case *sine die*, without protection; on the 11th of May, 1850, being the day after the last examination, the insolvent was arrested in execution in the action, and committed to the debtors' prison. After the lapse of about six months an application was made to the learned commissioner to grant him a protection order under the 7 & 8

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Vict. c. 96, c. 28, but the application was refused. Subsequent applications were made to the learned commissioner, but were attended with the same result.

An application was now made at chambers for the discharge of the insolvent, the defendant in the action, out of custody, upon affidavit of the foregoing facts, and also that more than twelve months had elapsed since the filing of the petition and the final hearing of the petitioner. The application was opposed.

WILLIAMS, J., doubted his power to discharge the insolvent.

It was admitted that there was no precedent, but reliance was placed upon the words of the statute.

WILLIAMS, J., consulted with Parke, B. Having returned, he made an order for the insolvent's discharge, grounded upon the affidavit and the words of the act of Parliament.

The insolvent was accordingly discharged.

HAMPSHIRE.

Basingstoke, July 25, 1851.

(Before CHARLES JAMES GALE, Esq.)

Re ALFRED HARMSWORTH.

Amending petition.

The petition must be in the form prescribed by the act, or it will be dismissed.

There is no power to amend the petition.

THIS insolvent, a clerk at the Basingstoke station of the London and South-Western Railway Company, came up for his first examination, and was opposed by *Macrae*, for a creditor.

The insolvent's petition followed the form prescribed by the act 7 & 8 Vict. c. 96, s. 2, in all particulars, except in the following paragraph: "That your petitioner is desirous that his estate should be administered under the protection and direction of this honourable court, and that he verily believes that such estate is of the value of nothing at the least unencumbered, and beyond the value of his wearing apparel and other matter which your petitioner is authorized to except by this act, and that the same is available for the benefit of his creditors." In this paragraph, the words "at the least unencumbered and" were struck out.

Macrae submitted that these words being struck out, the petition was not in the form prescribed by the act, and the petitioner was, consequently, deprived of a *locus standi*. The 7 & 8 Vict. c. 96, s. 2, enacts "that every petition for protection from process presented after the commencement of this act shall be in the form specified in the schedule (A.)," and, "if such petition shall not be in the form herein prescribed, such petition shall be dismissed." The first question was, whether the petition was in the form given in the schedule of the act? It was clear it was not. Certain words were struck out, and if one line was struck out two lines might be struck out, and if two or more lines might be struck out, two or more lines might be added, to make it suit the circumstances of a petitioner's case. It was clear no discretion was allowed the court. The act did not say if the petition was for the most part or substantially in the form given in the schedule, but the petition must be in the form given; therefore, the court had no discretion. If the court exercised a discretion as to one line, it might upon the whole petition. The principle was the same in all these cases: if one line might be struck out, one line might be added, and so on till the form which the act rendered it imperative to observe was altogether altered. In *Re Phineas Davis* (Macrae's *Insol.* Pract. 108), Mr. Commissioner Holroyd said, in a case where a line had been added to the petition to make it consistent with truth, "If the insolvent could not verify a petition in the form prescribed by the act of Parliament, he was not entitled to the benefit of the act, and the court had no discretion left but to dismiss the petition." The enactment had been construed strictly by all the commissioners in London. The next question was, had the court power to amend the petition? That the court had no power to amend the petition would be seen by an inspection of the cases cited in Macrae's *Insol.* Pract. 71.

His HONOUR intimated that he felt himself bound by the act and the decisions of the commissioners, and dismissed the petition.

Petition dismissed.

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ALFRED
HARMSWORTH.
—
1851.
—
Petition—Form
—*Amending.*

INSOLVENT COURT.

(Before Mr. COMMISSIONER PHILLIPS.)

*July 29, 1851.**Re JOSEPH HOWE.*

Appointment of assignees under 1 & 2 Vict. c. 110, and 10 & 11 Vict. c. 102, by the County Courts.

Held, that the judge of a County Court possesses and may exercise all the powers exercised by the Court for Relief of Insolvent Debtors at a hearing in reference to the nomination or appointment of assignees, but unless he duly forward the papers containing the notification of appointment and acceptance, as required by the 10 & 11 Vict. c. 102, s. 10, to the court-house in Lincoln's-inn-fields, the court will not take judicial notice of the appointment, and will proceed to act upon an application by another party for the appointment as if there was no such assignee.

THIS insolvent was heard in the County Court at Lancaster in May, 1850, and Thomas Smith was appointed assignee of his estate and effects, but as the papers were never forwarded to the court in London, as required by the 10 & 11 Vict. c. 102, s. 10, upon an application to this court by certain other parties, the provisional assignee granted a certificate that no such assignee had been appointed, upon which *Cooke*, on their behalf, obtained a rule *nisi* for their appointment as assignees.

To-day, *Lucas* showed cause, and, with affidavits of the appointment of Thomas Smith by the County Court, put in a parchment purporting to be the actual appointment by the County Court at Lancaster, on the 10th of May, 1850, acceptance having been duly signified, stamped with the seal of the County Court, and a certificate from the clerk of the court that this was the formal appointment issued by the court, Smith had taken out his appointment, though not in this court. Then the question was, whether or not a person who is appointed assignee by a County Court was bound to come to that court and take out his appointment? He had to argue that, since the statute 10 & 11 Vict. c. 102, and after the petition was referred to a County Court under that statute, the judge had sole jurisdiction in the matter, and that all he had to do was to transmit the record to this court, and that it was not necessary for the assignee to come there and take out his appointment. The learned counsel read the words of the clause, and contended that the County Court had not merely

the power to make the appointment, but that, upon signification of acceptance made to it, the clerk of the court had power to issue the formal document called an "appointment," which is the evidence of title.

Cooke, in reply, observed, that the court was quite aware that this subject had been most carefully gone into by Mr. Commissioner Law, in *Re Sarah Garside*, July 1st, 1850, reported in *The Law Times*, Vol. XV., pp. 347, 368. No matter by what authority a man was named assignee, his acceptance of the office must be signified to that court. The mere nomination by the County Court, or formerly by the commissioners on circuit, or even by this court, although it may fix the man to whom the estate is to be conveyed, does not give the property to him. There was something more to be done before the property of an insolvent vested in him. The man must accept the appointment, and signify such acceptance to the court. That could mean nothing but the court in London. They must look at the whole act of Parliament, and at the practice before the transfer of the jurisdiction. The record made at the hearing on circuit, that a certain party was to be appointed assignee, was transmitted to the court in London, upon which, acceptance being signified, and no reason appearing to the contrary, the appointment issued from the office of the provisional assignee, as a matter of course.

MR. COMMISSIONER PHILLIPS.—After the appointment by the circuit commissioner, was there any limitation in practice as to the time for signifying acceptance by the party appointed?

Cooke.—Yes; a month. The 30th section of the act (1 & 2 Vict. c. 110) gave the commissioner on circuit the power to appoint assignees at the hearing, and the 45th section gave the court power to appoint assignees at any time after vesting order made. These sections must be read together. There was no magic in the words "appointment by the court or commissioner." No property passed until the assignee appointed or nominated did the thing the statute declared necessary, namely, signified his acceptance to the court. Until the signification of acceptance to the court, there was no estate in the assignee appointed or nominated. The County Courts had the same powers as the commissioners on circuit and the court in London possessed in reference to the appointment of assignees at the hearing; but the acts of the County Courts must be governed by the same practice and the same law as those of the commissioners on circuit and the court in London. For the purpose of saving trouble and expense, the judge of the County Court was substituted for the commissioner on circuit. The clause in the 10 & 11 Vict. c. 102, gave him the same power as the 30th section of 1 & 2 Vict. c. 110, gave to the commissioners on circuit. These clauses were *mutatis mutandis* the same. It must therefore be looked upon as a part of the 1 & 2 Vict. c. 110, and the judge of the County Court must consider himself as a commissioner of the Court for Relief of Insolvent Debtors, and governed by the same law and practice as

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other commissioners. The law (sect. 45) required that in all cases there should be a signification of acceptance to this court. Then in the present case there had been no signification of acceptance to this court under the 45th section, therefore the property was still in the provisional assignee of the court.

Mr. COMMISSIONER PHILLIPS.—There is one thing clear, that this appointment is not registered in the books of the provisional assignee of the court, nor has there been any application to have it registered. This parchment purports to be an appointment by the County Court at Lancaster. There was no signature that it was entered of record by the provisional assignee. Had that registry been made according to the act of Parliament?

Lucas said it was utterly indifferent or not, so far as the appointment was concerned. The judge of the County Court was to transmit all the documents here to be registered, and if that appointment had not been registered, it was merely the *laches* of the judge of the County Court in not forwarding them, and could not affect third persons. A year had elapsed since he had acted as assignee, and he had got in all the estate and distributed it. He referred to *Re Notten* (12 L. T. 248), and contended that he had the authority of the learned commissioner for saying, that from and after the order of reference, the jurisdiction of the Court in London ceased, and that it could not afterwards interfere.

Mr. COMMISSIONER PHILLIPS said he was constrained to adhere to his opinion expressed in *Re Notten* respecting the appointment of assignees in insolvency cases by the County Courts. He differed *toto caelo* from the judgment of Mr. Commissioner Law. After giving all attention to it, he confessed he could not bring his mind to the conclusion he did. As to the case of *Notten*, he did consult the Chief Commissioner, and his answer was as read. He had consulted him again that morning, and his answer was, his mind wavered very much, and Mr. Commissioner Law having given the fullest consideration to the subject, he (the Chief) desired his vote to be thrown into the scale, although wavering. He (Mr. Commissioner Phillips) was not convinced by Mr. Commissioner Law's judgment, and it would lead to great saving of expense and trouble, if, instead of collating various acts of Parliament, they would take the plain words of the clause, and understand it. The plain question was, had not a commissioner on circuit merely the power to chronicle, but also to appoint? He was clearly of opinion that he had both, but subject to the contingencies mentioned by Mr. Cooke. The statute (1 & 2 Vict. c. 110, s. 30) said that such commissioner should have the same power at the hearing of an insolvent in the country, as the court had in London, and that he should make all orders, &c., necessary for the discharging or remanding of the prisoner, "and otherwise respecting such prisoner and his schedule, and his creditors, and his assignees, as the said Court for the Relief of Insolvent Debtors may make, give, or do in the matters of petitions heard by the

said court, and that in each and every matter to be heard and inquired into by such commissioner, *he shall have the same power as the said court would have therein*, if the same were heard and inquired into by the said court." He shall have the same power as the said court. What court? Why the full court. If the power of the court followed the commissioner into the country, and he sat with the same power, where then was the difficulty? And all and every act done shall be transmitted to the said court, signed by the judge: (10 & 11 Vict. c. 102, s. 10.) To what court shall they be transmitted? Why to the said court whose powers were given to the commissioner on circuit. The judge of the County Court had the same power to appoint assignees, but subject to the return of the appointment and signification of acceptance signed by the judge as directed by the act 10 & 11 Vict. c. 102, s. 10. These documents were to be transmitted to this court as records. He was not going to blink the question that it was the practice of the commissioner on circuit merely to nominate assignees, and that the court of four commissioners had a veto upon all acts done regarding the appointment of assignees upon due cause being made to appear; but what he contended for was that the commissioner on circuit went out with the full power of the court *pro hac vice*, and was empowered to do everything at a hearing which this court was empowered to do. One of these powers was the appointment of assignees; subject to the contingencies to which even the appointments in the full court were subject, namely, the signification of acceptance: (1 & 2 Vict. c. 110, s. 45.) Once the signification of acceptance being signified to the commissioner or court, this court had no power afterwards to interfere, except upon some statutable complaint: (1 & 2 Vict. c. 110, s. 65.) He would then go back to sect. 45. What was the language of the clause? "And when such assignee or assignees shall have signified to the said court his or their acceptance"—of what? Said nomination. No; but "*the said appointment*, the estate, effects, rights, and powers of such prisoner, vested in such provisional assignee as aforesaid, shall immediately, by *virtue of such appointment*, and without any conveyance or assignment, vest in the said assignee or assignees:" (1 & 2 Vict. c. 110, s. 45.) He confessed he thought there was great signification in this word "*appointment*," used there. He would now come to the 10th section of the County Courts Act (10 & 11 Vict. c. 102); and he begged the words of that section to be fully attended to, for it seemed to him that the Legislature had expressed itself in a most unmistakable way: "The judge of such court shall have and possess the same power and authority with respect to every such petition, and shall make all such orders, give all such directions, and do all such matters and things requisite for the discharging or remanding of such prisoner, and otherwise respecting such prisoner, his schedule, creditors, and assignees, as the said Court for Relief of Insolvent Debtors, or any commissioner thereof, might make, give, or do in the matters of

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petitions heard before such court or commissioner:" (10 & 11 Vict. c. 102, s. 10.) The Legislature not only gave the power of the court, but of the commissioner. Why was that word "commissioner" put in? It was highly probable that the gentleman who drew the statute had heard the practice of this court, and therefore put in those words, that there should be no doubt but that the judge of the County Court had both the power of the commissioner and the power of the court. It did not matter that the commissioner on circuit did not use this power. The point was, had he the power? He thought he had shown clearly that he had the power. A great portion of Mr. Commissioner Law's judgment hinged on the practice of the court. But the question was not so much as to the practice of the court, as the proper signification of these words in the 10th section of the County Court Act (10 & 11 Vict. c. 102.) The words clearly and plainly gave the judge of the County Court jurisdiction to appoint assignees. It was all very well for Mr. Cooke to say, with his usual ingenuity, that the question was, had that court clearly distinguished between the word "appointment" and "nomination?" He said it had. The 25th rule of court showed this. It was this—"Appointment of assignees.—Assignees will be *appointed*, if expedient, by the court or *a commissioner* at any time after vesting order made." Now what followed?—In a case heard at Berwick, a *nomination* by the *justices* will be attended to. *Appointments* might be made by the court or *a commissioner* at any time after vesting order made, but a *nomination* by the *justices* would be attended to. There he said the court itself had made the distinction. Upon reading that rule, the conclusion was inevitable that a commissioner had not only the power to nominate, but to appoint, although, as Mr. Cooke said, that appointment was nothing in itself unless followed up by its incidents, the solvency of the man, &c. But there was one important portion of the appointment, that was the signification of the acceptance by the creditor appointed. What did he (Cooke) say upon that subject? That this court, upon receiving the appointment and the signification of acceptance by the creditor, signed by the judge, was bound to register the acceptance, and the appointment and signification of acceptance so recorded, although emanating solely from the County Court, would be as valid as if made in and by this court. The nomination or rather appointment of assignees was made in that court at the hearing every day. But the non-acceptance of the appointment at the time did not vitiate the appointment in the court above. Why, then, should it have that effect in the court below? Under these circumstances, he was clearly of opinion that the judge of the County Court at the hearing in his court had the full power of this court. But there was another point. Had he a right to look at the appointment now produced in court at all? The judge of the County Court was bound to transmit his notification of appointment, and the signification of acceptance by the creditor or

other person, when made at the hearing, to this court, to be a record of this court. The certification of the nomination or appointment by the judge, and the signification of acceptance by the person appointed, had not been transmitted to this court. It ought to have been transmitted at once. It had not been done, and he could not take judicial notice of the act of the judge until he had duly certified it to this court by the transmission of the documents authenticated by his signature. If the judge was minded to keep this record below at Lancaster, he could take no notice of it, and he therefore thought that the rule should be made absolute for the appointment to issue.

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*Rule absolute, no record having been transmitted
to the Court; the affidavits signifying this
appointment and acceptance to appear on the
files of the court.*

INSOLVENT COURT.

PROTECTION CASE.

June 13, 1851.

(Before Mr. COMMISSIONER PHILLIPS.)

Re CHARLES HIPPOLYTE MANSELL, otherwise VICOMTE DE SECQUEVILLE.

Application for discharge ad interim, 7 & 8 Vict. c. 96, s. 6—Opposition upon merits.

Held, that creditors may oppose a petitioner's application for a discharge ad interim upon the grounds of opposition enumerated in sect. 24 of the 7 & 8 Vict. c. 96, and that the court will act upon these grounds of opposition there enumerated, not only upon "the day for the first examination," but also upon the preliminary application in the case of prisoners for a discharge ad interim.

THIS insolvent applied for his discharge *ad interim*, under the 7 & 8 Vict. c. 96, s. 6.

Cooke opposed the application upon the ground that he had con-

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discharge ad
interim—
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tracted debts without reasonable expectations of payment, which was a ground of opposition within the 24th section. By the 24th section of the 7 & 8 Vict. c. 96, it was provided that if it appear to the commissioner that any debts of the petitioner were contracted by fraud or breach of trust, or by prosecution, whereby he had been convicted of any offence, or without having at the time a reasonable or probable expectation of being able to pay such debt or debts, &c., no day shall be named for making the final order for protection; but, if otherwise, a notice of such day shall be given. Now, in this case the insolvent had borrowed money for railway speculation, which was a ground of opposition within the 24th section.

The insolvent had no counsel.

Mr. COMMISSIONER PHILLIPS said, a question had been raised whether he could take notice of the grounds of opposition enumerated in the 24th section upon this application, but it seemed to him a very circuitous and idle route to give a man his discharge one day for the purpose of remanding him the next day. If it were a case in which he could not name a day for a final order it would be idle to discharge the petitioner to-day, and remand him back into custody a few days after, upon the first examination. He should, therefore, refuse the application.

Application refused.

INSOLVENT COURT.

(Before Mr. COMMISSIONER LAW.)

August 7, 1851.

Re E. GOODING.

Discharge of debtor in execution for debt after vesting order made on creditor's petition—Effect of, upon claim of creditor to prove for dividend before adjudication.

Quære, does the discharge of a debtor in execution by the plaintiff operate as a satisfaction of the debt, so as to disable the plaintiff from proving for a dividend made under a creditor's petition, filed previous to the discharge, and under which no schedule had been filed:

Held, that a discharge of the debtor before adjudication is satisfaction; but that after adjudication it is not.

THIS was a claim to prove for a dividend under circumstances which are distinctly stated in the judgment:

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Mr. COMMISSIONER LAW said,—The question is raised, whether in this case, the discharge of the debtor in execution by the plaintiff operates as a satisfaction of the debt, so as to disable the plaintiff from proving for a dividend. The vesting order was made on a creditor's petition; the insolvent did not file a schedule; and the creditor, Mr. Loosemore, discharged him from custody. Mr. Loosemore now claims to prove. It happens that, after so discharging the defendant, he procured himself to be appointed assignee; and it is manifest that the court, on appointing him, was led to suppose that the insolvent was remaining in custody. These circumstances, however, do not affect the question of proof. That question is the same as if the claim were by some other person, not being petitioner nor assignee. The case is one of dividend without adjudication. The court comes to the business in ignorance of creditors, and acts under the instruction of the 62nd section of the statute (1 & 2 Vict. c. 110), which in such case requires the dividend to be made *among those who shall prove their debts*. Can, then, Mr. Loosemore prove? I think not. The law says that one who has had his debtor in execution and discharged him, has ceased to be a creditor. It has been urged that property which passed by the vesting order, is held in trust for those who were creditors at the date of the vesting order. Such are not the terms of the vesting order. The words are, “in trust for the creditors who shall be entitled to share in a dividend.” This sends us for information to the dividend clause which I have already mentioned, by which we find that those are entitled who shall prove their debts. Mr. Loosemore has no debt. He has done that by which he ceased to be a creditor. This court has decided that where the debtor has been discharged by his plaintiff after adjudication, the right to dividend is not lost. But it is not inconsistent with this, to decide that in the present case it is lost. When dividend is made after adjudication, the same 62nd section gives a different criterion of the right to dividend, expressly referring us to the sworn schedule. There may be errors in the schedule, and these are open to correction; but if it has been correctly sworn to, the debts which it discloses are the debts on which dividend is to be paid. A debt which had been already lost by discharge of the person from execution, would not properly stand as an existing debt on swearing to the schedule. This distinction, thus warranted by the words of the act, rests upon an intelligible principle. An insolvency without adjudication will not interfere with a creditor's right of suit. He holds his right untouched by the insolvent law. He holds it, then, on the usual terms, namely, that if after execution against the person he discharges the person, he discharges the debt. An adjudication alters the law between the parties, substituting a new relation between them under the decree of this court. The mode henceforth of acting against property is through the judgment which stands on behalf of the whole body of creditors, and which can

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only be put in execution under the discretion of the court. In the liability of person also a new state of things ensues. The unlimited power of the creditor is gone together with its incidents. It may be pronounced that in future no creditor shall take or detain the person; or it may be that some or all are permitted to do so for a limited time; but it is no part of the decree of this court, nor in the spirit of it, that any creditor, though such qualified power is accorded to him, shall be required to exercise it. Those who have not already arrested an insolvent are not compelled to procure a detainer. So one who has before arrested is not compelled to continue a detainer. It would be a compulsion, and a compulsion resting on no principle, if, by discontinuing the detainer, he should forfeit his claim to dividend. I say, then, that without adjudication an insolvency has no prospective consequences; is not pleadable; avails nothing for the debtor: a plaintiff detains him as long as he thinks fit; but, if he voluntarily discharges him, he cannot be retaken; and the satisfaction of the debt, which was inchoate by the capture, becomes complete. This is quite consistent with the principle that, when an insolvency has been attended with adjudication, the qualified right of detainer exists only under the special sanction of this court; so that he who is left for some specified time at the mercy of his creditors may be discharged by those who have had him in custody, and may remain unmolested by the rest; or, till the period arrives, he may be more or less deprived by them of his liberty. It is no part of the law of this court, that when the insolvency shall be referred into adjudication, the creditor who originally detained shall be incompetent to waive the privilege which, by the terms of that adjudication, may be continued to him. The justice of the distinction, namely, that a discharge before adjudication is satisfaction, and after adjudication is not, will easily be recognised. We are all familiar with the practice for a detaining creditor to send a discharge shortly before the hearing, thereby making it impossible for the debtor to obtain for himself the benefit of an insolvency. In 1838 I proposed a remedy for this injustice, and pressed it upon the authorities when the act of 1 & 2 Vict. was in progress. But they were deaf to my remonstrances, and the injustice is unremedied. Surely it is fit, that one who thus perversely sends his debtor a discharge, should do so on the usual condition, that such discharge operates as a satisfaction of his particular debt; that, while it damages the debtor, it should have its usual result to the creditor. A plaintiff in such case causes the insolvency to be abortive for the other party, and prevents the contemplated change of relation between him and his creditors from being matured; from the moment of that discharge he remains liable to each of those who continue creditors; the insolvency has done something against him, nothing for him. It is, then, a just consequence to him whose act causes such defeat of hopes, that that act should have to himself the ordinary effect. He takes from the defendant the benefit of the statute; why not then from himself also? It is, however, no less clear that, in the other

case, when an insolvency has been perfected by coming to judgment, and the debtor has got for himself the benefit of it, the same thing would not be a just consequence. The law is now modelled. Individual satisfaction can never again be sought by any process. The law has interposed, not in the ordinary way between A. and B., but between A. and the entire body of his creditors; and, though the policy of the law does in certain cases still prescribe a limited liability of person, there is no ground for saying, that the law exacts, against the discretion of a creditor, that he should be the inflictor of the penalty. He is entitled to say that his position is changed; he has acted for others as well as for himself; he can no longer wield the power which the general law gave him as a plaintiff; but he has gained other objects in its place; title to existing property for all creditors, and special means, through this court, of resorting to future property if it should arise. The rights of all, with the duties and the risks of all, are made the same. In the present case, Mr. Loosemore knowingly substituted one state of things for another, as affects himself. He discharged the judgment debt, taking a fresh written promise, having its own dimensions. On this the insolvent remains liable. Mr. Loosemore has the benefit of it. It was by his own act, the liberation of the debtor, that he got that benefit. That act made adjudication impossible. If there had been adjudication, a new promise would not have availed for that debt. The claim would have remained cognizable in this court, and this court only. Mr. Loosemore has made his election. He has discharged the debt which otherwise he would be competent to prove, and he has acquired a new right, on which there can be no proof.

Claim to prove disallowed.

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1851.

*Discharge after
vesting order—
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COUNTY COURT OF MIDDLESEX.

BROMPTON.

(Before ANDREW AMOS, Esq.)

RUSSELL v. SMITH.

Discharge under the Insolvent Debtor's Act—Premiums upon policies of assurance deposited as security for the payment of a debt inserted in the schedule subsequently becoming due.

Defendant being indebted to plaintiff assigned to him, by deed of mortgage, three policies of assurance on defendant's life, and covenanted to pay the annual premiums, and if he did not, and plaintiff paid them, to repay plaintiff. Defendant afterwards became insolvent, and was discharged under the Insolvent Debtors' Act. A premium accrued due after the discharge, and being unpaid by the defendant, and plaintiff having paid it, and not been repaid:

Held, that defendant was not discharged from liability for these breaches of covenant by his discharge from the original debt under the statute 1 & 2 Vict. c. 110.

THIS was a plaint to recover a sum of 4*l.* 13*s.* 6*d.*, exclusive of 8*s.* 8*d.*, cost of summons, &c., being the amount of an annual premium becoming due upon three policies of assurance deposited with the plaintiff as a collateral security for the payment of a debt then due by the defendant, and which he had covenanted to pay, but not having paid them, the plaintiff had, and he now brought this action upon the defendant's covenant to repay him.

Lord appeared for the plaintiff, *Macrae* for the defendant.

The facts of the case are shortly these:—The defendant, Mr. Henry Valentine Smith, being indebted to the plaintiff, deposited with him three policies of assurance, effected upon his own life, in the Commercial and General Life Office, Cheapside, as a security, and, subsequently, further sums having been advanced, by way of better security, he executed a mortgage of these policies, in which, after reciting that H. V. Smith was entitled to the policies of assurance under the annual premiums mentioned, and that H. V. Smith was indebted to Thomas Russell in the sum of 180*l.* for moneys advanced, and that H. V. Smith had agreed to secure the repayment of the debt, the defendant, Smith, covenanted to pay the debt with the interest growing due, and until that was satisfied, that he would pay, or cause to be paid, the annual premiums upon the policies assigned, and if he did not,

then Russell was to pay the premiums, and the mortgagor, Smith, covenanted to repay the same to the mortgagee: (See Form, Davidson's Martin, vol. 3, p. 614.) After the execution of this deed, the defendant became insolvent, and upon petitioning the court for relief, entered both the original debt and the security given in the schedule.

The defendant was duly discharged under the act (1 & 2 Vict. c. 110) on the 4th of July, 1850, and subsequently the premiums upon the policies becoming due, insolvent being advised that as he was discharged from the original debt, he was not liable on the security, declined to pay them. The premiums were then paid by the plaintiff, and he now brought his action to recover this amount, in pursuance of the terms of the covenant. The question for the court to determine was, whether the insolvency which discharged the original debt also discharged the payments defendant had covenanted to make upon the security.

Lord relied upon *Bennett v. Burton*, 12 A. & E. 657 (a); 4 P. & E. 313; 4 Jur. 1085, Q. B.; *Fletcher v. Turk*, 13 L. J. N. S. 43, Q. B.; *Lloyd v. Peell*, 3 B. & Ald. 407 (b); *Wilmer v. White*, 1 Bing. 291; *La Coste v. Gillman*, 1 Price; *Toppin v. Field*, 4 Q. B. 386, &c. These cases were all precisely in point, as would be seen upon referring to them.

Macrae, for the defendant.—The question involved in this case is one of great importance, both to the defendant personally, and to the community at large. Upon the decision of the court will depend the liability of the former to annual payments for his whole life; and the question as regarded the community was, in effect, whether the insolvency laws would become a dead letter, for if the defendant was liable, the plaintiff, by taking this security, would completely evade the insolvency laws, obtain a preference for himself, and secure the payment of his debt in defiance of their provisions. The defendant, at the same time, would be constantly exposed to periodical suits on account of this debt, and periodical insolvencies or embarrassments on account of debts from which it was the very object of the Legislature to relieve a prisoner when it enacted this code of laws for his relief. Looking carefully into the act of Parliament, and also into the cases, none of them bear decisively upon this point, and even the reasons given by the learned judges, are not convincing. First, to direct his Honour's attention to the various provisions in the act bearing upon this point, and then to state the points relied

(a) In that case a mortgage deed contained a covenant by the mortgagor to insure his life for the mortgagee's benefit, and to keep the premiums paid till the debt was discharged, with a provision similar to that in the case above if the premiums remained unpaid, and the mortgagor having taken the benefit of the act 7 Geo. 4, c. 57, and included the mortgage debt in his schedule, stating also that the creditor held a policy on his life with the joint security of A. B. for payment of premiums, it was held that the mortgagor was not protected by his discharge, and sect. 51 of the statute (similar in its provisions to sect. 80 of 1 & 2 Vict. c. 110), from an action of covenant at the suit of the mortgagee for premiums becoming due after such discharge, and paid by the mortgagee on the mortgagor's default.

(b) That case decided that a plea of discharge under the Insolvent Act is no bar to an action of trespass for *meane* profits, even though accruing before the discharge.

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upon ; and lastly, to make such comments upon the cases relied upon as seemed desirable. His Honour would see, from the provisions of the act, that it was clearly the intention of the Legislature, in return for vesting the whole of a prisoner's estate for the benefit of his creditors, to relieve him from *all pecuniary liabilities subsisting at the date of the insolvency.* The various provisions of the act to which it was necessary to direct the attention of the court were these :—A debtor being in custody for debt, “ shall pray to be discharged from custody, and to have future liberty of his person against the demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be or claim to be creditors of such prisoner at the time of presenting such petition : ” (1 & 2 Vict. c. 110, s. 35.) And then “ it shall be lawful ” for the said court “ to adjudge that such prisoner shall be discharged from custody and entitled to the benefit of this act as to the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of making such vesting order as aforesaid, and which were not then payable : ” (1 & 2 Vict. c. 110, s. 75.) “ And be it enacted, that the discharge of any such prisoner so adjudicated as aforesaid shall and may extend to *any sum and sums of money which shall be payable by way of annuity or otherwise at any future time or times by virtue of any bond, covenant, or other securities of any nature whatsoever :* ” (c) (1 & 2 Vict. c. 110, s. 80.) And in respect of any security, “ no writ of *ft. fa.* or *elegit* shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action *upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act ;* and that if *any suit or action* shall be brought, or any *scire facias* be issued against any such person, &c., for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person for the same, *except as aforesaid,* it shall be lawful for such person, his heirs, &c., to plead generally that such person was duly discharged according to this act by the order of adjudication made in that behalf, and that such order remains in force, ” &c. : (1 & 2 Vict. c. 110, s. 91.) The mode of proceeding for the payment of scheduled debts is pointed out in 1 & 2 Vict. c. 110, s. 87—“ And be it enacted that before any such adjudication shall be made with respect to any such prisoner the said court or commissioner or justices shall require such pri-

(c) It has been held that an insolvent is not by his discharge released from an action at the suit of his surety, for money paid after such discharge in respect of an annuity due by the insolvent before: (*Abbott v. Bruere*, 5 Bing. 598, N. C.; 7 Scott, 753, S. C., and see the cases there cited; *Powell v. Eason*, 8 Bing. 23; *Hocken v. Brown*, 4 Bing. 400, N. C.)

soner to execute a warrant of attorney to authorize the entering up of a judgment against such prisoner in some one of the Superior Courts at Westminster, in the name of the assignee or assignees of such prisoner, or of such provisional assignee, if no other assignee shall have been appointed and shall have accepted such office, for the amount of the debts stated in the schedule of such prisoner so sworn to as aforesaid to be due or claimed to be due from such prisoner, and so much thereof as shall appear at the time of executing such warrant of attorney to be due and unsatisfied, &c.; and the order of the said court for entering up such judgment shall be a sufficient authority to the proper officer for entering up the same, and such judgment shall have the force of a recognizance, and if at any time it shall appear to the satisfaction of the said court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead, leaving assets for that purpose, the said court may permit execution to be taken out upon such judgment, for such sum of money as under all the circumstances of the case the said court shall order, such sum to be distributed rateably amongst the creditors of such prisoner according to the mode hereinbefore directed in the case of a dividend made after adjudication; and such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall be fully paid and satisfied, together with such costs as the said court shall think fit to award." Now these are the provisions of the act bearing upon this subject; and upon considering them it is impossible not to see that it was the intention of the Legislature to free an insolvent, not merely from all subsisting debts, but from all liability on securities held for those debts. The insolvency laws were intended to withdraw the insolvent and his affairs, so far as regarded pecuniary liability, from the general law of debtor and creditor, and to place him and his affairs under the special provisions of the statute, and these provisions denied the right of suit to any individual creditor in respect of any subsisting debt, and upon any sum of money payable by virtue of any bond, covenant, or other securities of any nature whatever" (s. 80), and were intended to protect the debtor in the undisturbed enjoyment of his future-acquired property in respect of these debts until he should have acquired such a degree of the means of subsistence as to be in a state of solvency, and have a surplus (1 & 2 Vict. c. 100, s. 89) to spare, upon which event, and not till then, the Legislature authorized the appropriation of his future-acquired property in payment of his past debts. The policy and intention of the law, both as regarded the creditors and the insolvent, was clear. He was fully borne out in this by the declaration of Mr. Commissioner Law, probably the highest living authority on this subject, who had materially aided Lord Eldon in perfecting the provisions of the previously defective statutes. In regard to their policy as regarded the insolvent, that learned commissioner observed, in his judgment in *Hance's case*, "Can any

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man study the Insolvent Acts, from that of 1813 to the present day, and not discern the policy of these laws? It is that a man shall be able to earn himself a livelihood without being harassed for his debts; that his struggle for subsistence shall not be frustrated by the invasion of his means of subsistence; that his past debts shall only be a charge on the contingency of a clear surplus estate: (*Re Hance*, 1 Cox, Macrae, & Hertslet, 141.) To hold the defendant liable would be contrary to the policy of the law as regarded *the creditors also*, this would be seen by reading the 87th and 91st sections, which rendered void "new securities," placed all creditors in respect of the payment of their debts upon the same footing, forbidding all suit except upon the judgment entered up under the provisions of the act for the benefit of all the creditors collectively, and deferring even that mode of payment until it should appear to the satisfaction of the court that the debtor had not only the means of payment but a surplus. If the plaintiff succeeded in this case, he would obtain *a preference over all the other creditors*, which it had been the fundamental object of both the Bankruptcy and Insolvency Laws from their commencement to prevent. To show how careful the courts had been to prevent these undue and unfair preferences, he would direct his Honour's attention to some few of the cases:—C. P. Hilary Term, 10 Geo. 3, 1770, *Linton, assignee of a bankrupt, v. Bartlett* (Wilson 49.) The court said, that "all the laws concerning bankrupts, proceed upon equality, and say that all the creditors shall come *in pari passu*. There is no case where such a preference was allowed. The same spirit of equality ought to warm the courts of justice which warmed the Legislature when they made the Bankrupt Laws, and if we should let this deed stand, we should tear up the whole Bankrupt Laws by the roots; it is a bill of sale made by a trader at a time when he was insolvent, and plainly had an act of bankruptcy in contemplation. It is partial and unjust to the other creditors.—Judgment for the plaintiff that the deed is bad." In *Phillips v. Hunter* (2 H. B. 403), in error, it was laid down by the *judges* that "the great principle of the Bankrupt Laws is justice founded upon equality. No creditor shall be permitted to acquire an undue preference, and by so doing prevent an equal distribution amongst all the creditors. . . Equal distribution is the policy of the Bankrupt Laws." In *Re Wetherell* (11 L. T. 373), Mr. Commissioner Law said—"The general policy of the act is that all property should be made available for the creditors *generally*, rather than for one in particular." In *Smith v. Wetherell* (10 L. T. 229), Lord Denman, in delivering judgment for Mr. Justice Patteson in the Bail Court, says—"The argument which weighs with my brother Patteson is this, that the main scope and object of the act (1 & 2 Vict. c. 110) is to divide the insolvent's property rateably among his creditors, and this object is best effected by such a construction of the 55th and other sections as would not give the opportunity for any particular creditor to interfere and obtain a preference over the others."

Having directed his Honour's attention to the special provisions of the act, and their equitable construction as to policy and intention, as laid down by the highest authorities, he would now state the points upon which he relied, *considering first the proper construction of the language of the several clauses intended to protect the debtor, and then the peculiar provision of the statute with respect to future-acquired property, with which the right of individual suit, and the consequent individual appropriation of future property, came in direct contact.* The prisoner first prayed for liberty against the "demands for which such prisoner shall be then in custody, and against the demands of all other persons who shall be, or claim to be, creditors :" (s. 35.) The adjudication clause then rendered it lawful for the court to adjudge such prisoner entitled to the benefit of the act, as to "*the several debts and sums of money due or claimed to be due at the time of making such vesting order as aforesaid from such prisoner to the several persons named in his schedule as creditors, or claiming to be creditors, for the same respectively . . . and which were not then payable :*" (s. 75.) A limited or a larger construction could be given to these words. The word "debt" was defined to be a demand for a sum certain (d) "a sum of money due by certain and express agreement, as a bill of exchange or a promissory note;" and although, strictly speaking, this premium at the date of the vesting order was not an existing debt that could be claimed as then due, yet if one cast about for an equitable principle of interpretation, it would be clearly this: that a prisoner should be protected in respect of existing pecuniary liabilities to the extent to which his property vested. If a prisoner had a title to property, reversionary, contingent, or otherwise, at the date of the vesting order, that property, if ever it came to him, belonged to his creditors named in the schedule; so, also, if he was under pecuniary liabilities, contingent, reversionary, or otherwise, at the date of the vesting order, if these liabilities ripened into debts, he should be protected in respect of them. The principle of equity was that a debtor should be protected from the demands of the creditors, to the extent to which his property vested for the creditors. He therefore submitted that the court should adopt the larger construction of the words, "debts and sums of money due or claimed to be due." The next section to which he had directed the attention of the court was the 80th. That was certainly very strong. It extended the protection of the statute "to any sum

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(d) Wherever a legal liability devolves upon a party to pay a determinate sum of money to another (either in consequence of an express promise or an implied obligation) the law denominates such liability a debt: (2 Bla. Com. 465.)

"In general, whenever a contract is such as to give one of the parties a right to receive a certain liquidated sum of money from the other," a debt is then said to exist between the parties: (Stephen's Com., vol. ii., p. 186.)

"The legal signification of debt is a sum of money due by certain and express agreement as by a bond for a determinate sum, a bill of exchange, or a promissory note, or a rent reserved on a lease where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it:" (Les Termes de la Ley, 1685; and in Holthouse's Law Dic. p. 130, title "Debt," 1846.)

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of money payable at any future time by virtue of any bond, covenant, or other securities of any nature whatsoever." Strictly speaking, this premium was not "a sum of money payable at any future time,"—at the date of the vesting order,—"by virtue of this security." It was not certain that it ever would become payable; but, looking at the language of the 87th section, which forbade the payment of the original debt, the court was bound to construe it as if certainly payable and grant its protection accordingly. But so anxious had the Legislature been to afford effective protection to the debtor, that in the 91st section it made void "any new contract or security" for the payment of the schedule debts. If these policies were given as securities for the payment of the original debt after the discharge, there could be no doubt that the debtor would be protected from all payments in respect of them, and he could not see why the same principle should not be applied to this security, although given before the insolvency. He relied upon the language of these sections, but chiefly and mainly he relied upon the fact that this deed, upon one of the covenants of which the plaintiff sought to recover, was a contract between two private parties, to secure the payment of a scheduled debt by other means than those pointed out by the Legislature in the 87th section. It was a contract to give the plaintiff a right of suit in respect of the non-payment of a scheduled debt. Upon the insolvency occurring, that became an illegal purpose. The statute forbade individual suit, and enjoined process under the control of the court on behalf of all creditors collectively. This deed had the effect of giving an undue preference to the plaintiff, and by giving him the right of suit upon non-payment of his debt, it to that extent gave him power over future-acquired property of the insolvent, which no other creditor had, and which it was contrary to the intention of the Legislature, and the policy of the act, that he should have. The court, he submitted, was bound to enforce the provisions of an act of Parliament, in preference to the contracts of private persons. (e) Upon principles of equity as between the parties to this action, the plaintiff had not a shadow of a right to enforce this demand. The consideration upon his part was the forbearance of suit in respect of the original debt. The statute now stepped in, and declared that he should have no right of individual suit in respect of that debt: therefore, the consideration on his part being taken away, and there being no new consideration given, it was manifestly unjust that the defendant should be called upon to fulfil his share of the contract. The defendant was forbidden to pay the original debt by the statute, and the plaintiff was forbidden to sue for it. The very basis of the contract being taken away by the Legislature itself, how then could the other

(e) All deeds are liable to be impeached if founded on immoral or illegal consideration, or if obtained by fraud: (1 Stephen's Com. 462.)

Any contract is invalid in law that can be impeached on the ground of dishonesty, or as being opposed to public policy: (Broom's Legal Maxima, 575.)

parts of it be enforced? He called upon the court to set aside the whole deed, and relied upon *Jackson v. Davidson* (4 B. & Ald. 691.) In that case an insolvent debtor having petitioned the Insolvent Court to be discharged under the act, a creditor gave notice of his intention to oppose him, on the ground that the debt was fraudulently contracted. To induce the latter to withdraw his opposition, the insolvent agreed to execute, within three days of his discharge, a warrant of attorney for the debt, and in the meantime to give a promissory note of a third person for the amount, which was to be delivered up on the execution of the warrant of attorney. The insolvent was discharged, and the warrant of attorney was executed on the delivering up of the note. The court set aside the warrant of attorney, and the judgment entered up thereon, on the ground that the agreement on which they were founded was contrary to the policy of the Insolvent Act, inasmuch as it enabled the creditor to take to himself a large portion of the future effects which the Legislature intended to be distributed *amongst all the creditors*, Bayley, J., observing, that the warrant of attorney, if supported, would interfere materially with the policy of the act, by taking from the body of the creditors a portion of those funds which the Legislature meant to be distributed amongst all, and by defeating the effect of the judgment entered up by order of the Insolvent Court. Holroyd, J., was of the same opinion, and said, "This warrant of attorney was founded upon an agreement which is in direct opposition to the policy of this act of Parliament. The object of the act was, that the person of the debtor should be free with respect to all those debts from which he had been discharged, and that his future effects only should be liable in the mode there pointed out." Best, J.—"The future effects of the insolvent are, by the provisions of this act, directed to be divided rateably amongst the creditors until their debts are wholly paid. By enforcing such a security we should enable the plaintiff to deprive his co-creditors of some portion of that fund which the Legislature intended to be rateably divided amongst all." The courts had again and again recognised this principle of supporting the insolvent law in opposition to private deeds. In *Rogers v. Kingston* (2 Bing. 441), the defendant was a discharged insolvent, and a creditor withdrew opposition after receiving a promissory note for the amount of his debt. The insolvent was arrested for the non-payment of this after his discharge, but settled the action by giving a warrant of attorney, in which his brother joined, to confess judgment for the amount of the debt, and costs, and interest, to be paid by instalments. The court, on motion, set aside this warrant of attorney, after the payment of the first instalment, upon the ground that the whole transaction was contrary to the policy of the Insolvent Debtors' Act. Best, C. J., says,—"The party who has obtained this warrant of attorney places himself, by the *sale of his forbearance*, in the situation of a new creditor, and in a better position than he is entitled to claim." Park, J., says,—"The argument which has been used in support of this

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warrant of attorney is in opposition to all the cases which have been decided, from that of *Jackson v. Duchaire* (3 T. R. 551), downwards. The general principle of all these cases is, that one creditor shall not be permitted to obtain an advantage at the expense of the others, but the case turns on the 25th section of the Insolvent Debtors' Act, which gives the commissioners power to issue execution against an insolvent's subsequently acquired effects, and divide them rateably among the creditors; but as the plaintiff's name was not inserted in the schedule, he might sue out execution without application to the commissioners, and thereby gain an advantage over the rest of the creditors. The 26th section of the act provides that an insolvent shall not be arrested for a debt due to a former creditor, and if the plaintiff's name had been inserted in the schedule, the insolvent's person would have been safe. This the plaintiff prevents by taking a promissory note contrary to the policy of the act. The case in the King's Bench proceeds on the true ground, and is in point for the defendant." Burrough and Gaselee, JJ., concurred. The observations he had made applied in some respects to the cases in bankruptcy relied upon by the plaintiff, and in other respects they did not; but in none of these cases had counsel attacked the ground of the consideration for the security, as being contrary to the policy of the insolvent law, and in direct collision with the machinery provided by the act for the payment of the debt, and perhaps they could not, for there was no such machinery provided in bankruptcy as in insolvency, and a written promise might renew the debt. With respect to the decisions relied upon in insolvency, the case of *Bennet v. Burton* was in point; but, looking at the reason assigned by the court for giving the verdict for the plaintiff, it was not convincing to his mind. Lord Denman said the Insolvent Debtor's Act did not extinguish the debt, it only barred the remedy. But it did not occur to the court, nor was it suggested by counsel, that the act does extinguish the debt for some purposes; and it is only by holding to this principle that the greatest absurdities are prevented in administering the law of insolvency. "The debt," says Mr. Commissioner Law, in *Re Hance*, "we know is not extinguished for all intents and purposes, but the power of proceeding for the recovery of it is extinguished, excepting upon the judgment in the several ways prescribed by the statute;" and, again, "there can be no suit except upon the judgment, therefore no suit whatever by individuals for suit upon the judgment is on behalf of all together." The Court of Queen's Bench admitted that, if the debt was extinguished, the action could not be maintained. The debt is extinguished for all purposes of individual suit. This was an individual suit, and taking the reasoning of the court, upon its own showing the verdict ought to have been for the defendant; but most of the principles to which he had alluded were never brought under the notice of the Superior Courts, and were mentioned to His Honour for the first time. He, therefore, trusted they would receive full

consideration. This class of cases should be decided upon the equitable principles which governed the administration of law under the special circumstances to which an insolvent and his affairs became subject, when they were withdrawn by bankruptcy or insolvency from the general law of debtor and creditor. If it became generally known that a man could always secure the repayment of money advanced, and harass his debtor for life, in defiance of the insolvency laws enacted by the Legislature for the debtor's protection, the consequences would be most serious. If a poor debtor had a hundred creditors in his schedule for sums between 50*l.* or 150*l.* all secured in this way, there would be nothing for him but periodical insolvencies or perpetual imprisonment, and the insolvency laws would in effect become a dead letter. This was a most serious result in a commercial country, and such would be the result if this became generally known to be law. He looked with anxiety as to the result, particularly as there was no mode of bringing the principles he had advocated under the review of the Courts at Westminster, to which they had certainly never yet been presented. He trusted, as there was no appeal, His Honour would do substantial justice, according to the intentions of the Legislature.

His HONOUR intimated that he would take time for consideration.
Judgment was ultimately given for the plaintiff. (a)

(a) See observations on the point decided in this case in 17 L. T. 215, and 4 C. C. Chron. 324.

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INSOLVENT COURT.

March 27, 1851.

(Before Mr. COMMISSIONER PHILLIPS.)

Re EDWARD BELL.

*Mortgage creditor—Dividend—Stay of—Proof—Valuation of security
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The general rule upon declaration of dividend and proof of debts is that creditors holding securities from the debtor alone shall not prove unless the security be given up or its value ascertained by sale, so that the creditor may prove for the difference; but the court will, under peculiar circumstances, and upon sufficient cause shown, where the amount of the creditor's debt is very considerable, stay the dividend, direct the creditor's security to be estimated at its maximum value,

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and allow him to prove for the difference, he undertaking that, if the security is ultimately sold for more than the estimated maximum value, the surplus should be paid to the assignees.

COOKE moved that the administrators of John Bell should be allowed to prove the amount of their debt, and when that should be ascertained, that a maximum value should be put upon the security they held, and the administrators allowed to prove for the difference, if any, and that the dividend be stayed in this court until further order. There had been in this matter an audit and proof of debts, and there was a registrar's report upon this debt. This was a question of proof of debt, and whether it should be allowed to be made under peculiar circumstances without an order for the immediate sale of the creditor's security, which would be highly injurious to the sale of the security and disadvantageous to the creditors. The registrar (Mr. Ingpen) thought the general rule should be observed, that the security should either be given up, or its value ascertained by sale. That was the general rule undoubtedly, but there were exceptions, such, for instance, as that before the court, where there would be a great loss if the property were sold immediately. The facts of this case were these: Edward Bell became insolvent in May, 1841, and assignees were appointed in the July following. The insolvent, at the date of the failure, was indebted to his brother, John Bell, to the extent of about 554*l.* 8*s.* 10*d.* This creditor held certain securities for the advances he had made to his brother, and amongst them a mortgage by the insolvent of his reversionary interest in certain property upon the death of their mother, Mrs. Mary Bell. In November, 1847, John Bell died intestate, and letters of administration were granted to his brothers, James and Alfred, and the insolvent. A suit was then instituted in Chancery between Mrs. Mary Ann Bell, the mother, and James and Alfred, and the assignees of the insolvent. A decree for an account was made in January, 1848. This suit was for the purpose of administering the estate of the intestate. The Master's report was dated June, 1849. The Court of Chancery, by an order on further directions, directed that the Master should inquire what steps ought to be taken for realising the estate of the intestate, and if the Master should find that any steps ought to be taken, then that James and Alfred, as representatives of the intestate, should be at liberty to take the same to get in the personal estate. The Master had not yet made any report in pursuance of that part of the order. And in this state of things they received a notice from this court in January, 1851, of a proof of debts and dividend in the insolvency of Edward Bell. They, as administrators of John Bell, received notice to the effect that the assignee's accounts would be audited on 24th January, 1851, in order to a dividend, and they were required, among other things in the notice, to show cause why the said intestate's debt should not be struck out, and if they claimed to prove why the security they held for their debt should not be given up. The administrators attended the audit and explained

the nature of the suit in *Bell v. Bell*, and the order of the 30th July, 1849; and that the Master had not yet made his report, nor had the court made any order respecting the mortgage security, until which they could not give it up or sell it, nor could they sanction the mortgage debt being struck out of the list of creditors. They claimed to have it retained and the dividend reserved thereon, and that the mortgagees should be allowed to hold over their securities until the decease of the tenant for life (Mrs. Mary Ann Bell), or to await the direction of the Court of Chancery in this suit. The Examiner intimated that if they refused to give up the securities he would expunge the debt and divide the estate amongst the other creditors. That would be highly injurious to the administrators. The mortgage security was believed to be insufficient to pay the mortgage debt and interest thereby secured, but that could not be ascertained until after the decease of Mrs. Mary Ann Bell, when the reversion would fall into possession, and the insolvent's interest be then defined and received or sold, or until the reversion be sold, which could not be done until the Court of Chancery made an order to that effect in the suit of *Bell v. Bell*. The administrators now wished to prove for the sum of 400*l.* and the arrears of interest, and the sums paid for the premiums on the policy up to the present time, or for any and such part of the said principal sum and interest as the court should consider them entitled to. The full claim was opposed by the assignees, who contended that they were only entitled to the principal money and interest up to the date of the vesting order. But this point was not decided by the Examiner, who refused to allow the debt at all. He thought the circumstances of this case were so peculiar as to justify the court in departing from the general rule of practice. They, therefore, prayed that the interest under the mortgage deed should not be sold for the present, or until further order, but that the maximum value should be found thereon, and they be allowed to prove and receive dividends for the difference, or that the dividends should be reserved until the ultimate sale of John Bell's interest under the deed, and they would undertake that if the interest should ultimately be sold for more than the maximum price, the assignees should be entitled to receive for the difference.

Nichols, for the assignees, contrà, said that it was the invariable rule in bankruptcy to require securities, to be sold or given, except under very special circumstances. The cases in which exceptions to the general rule had been allowed, had no reference to the circumstances of this case. An indefinite postponement of a sale for years was a thing never heard of. Here was an absolute vested interest in the insolvent, subject only to the time of payment. There was 300*l.* in court for division amongst the creditors. They had a right to have that dividend at once, but a favoured creditor —a mortgaged creditor said "No, you must not divide." That creditor, who could not prove, because he could not sell, wished to put aside a slice of the money for years, until he should be able to

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prove. He thought the ordinary course should be followed, and the securities at once sold.

Mr. COMMISSIONER PHILLIPS.—A sale in the present state of things would involve a loss.

Nichols.—That is all an assumption. If goods were to be sold in a falling market, by all means stay the sale. But this was a vested interest, which would, unless there were particular circumstances, always sell for its value. They had a right to compel them to sell the property. That is the law.

Cooke.—The exceptions are as much the law as the rule.

Mr. COMMISSIONER PHILLIPS.—How are you hurt?

Nichols.—We do not get this money divided amongst us now when we are entitled to it. The law says we are entitled to a sale.

Mr. COMMISSIONER PHILLIPS.—Then read the exceptions. Show me that you sustain 5*l.* injury.

Nichols challenged his learned friend to find any such case amongst the exceptions.

Cooke referred to *Ex parte Nunn* (1 Rose, 322); *Ex parte Smith* (2 Gly. & J., and 2 Rose, 63.)

Nichols referred to *Ex parte D. Tasted* (1 Rose, 324.) It was not a fair subject for an exception, and involved almost an indefinite postponement.

Mr. COMMISSIONER PHILLIPS.—The rule that securities must be realised before proof of debt by a creditor is a general rule, and subject to exception. The question is, should the order be for the immediate sale of these securities in the teeth of the uncontradicted statement, that it would be attended by a considerable sacrifice? The assignees ought to have been able to make out a very strong case to induce me to order immediate sale under such circumstances. The proposition made by the learned counsel can hurt nobody. He said, "Do not sell immediately, but value the property at its maximum value, and let us prove for the residue now." Who would be injured by that? I think that, under the circumstances of this case, I do not risk anything, if I allow the motion to be hung up until after the Master's report. I have not the least hesitation in stating what I shall then do. The parties, after the report, should come with the maximum valuation; they would then see how near it came to the amount of the debt. If the parties cannot agree, let them come with the mean valuation; if it does not exceed the debt, let that stand. I will not compel immediate sale. Let them prove for surplus, and nobody would be injured. I am aware that this decision must be considered an exception to the general rule. My reasons are, that, taking the maximum value, and letting the administrators prove for the surplus, did damage to no one; while, by following the ordinary course, it would do harm. The only injury to the creditors was the postponement of the dividend until after the Master's report, which was likely to be immediate. It is, I believe, postponing a very small dividend for a very short time—that was

all the harm ; but by so doing, we avoid clashing with the Master's report, and avert a great sacrifice—that was the good.

The order made by the court was to the effect that the administrators of John Bell, deceased, a creditor of the insolvent, shall be allowed to prove the amount of the debt due to the deceased John Bell, and when the amount of such debt shall have been ascertained, that a maximum value be put upon the security or mortgage held by the creditor, and the administrators be allowed to prove for the difference (if any); that the sale of the said mortgage security be stayed until an order shall have been made in the Court of Chancery in the cause of *Bell v. Bell*, or until the death of Mrs. Mary Ann Bell; that the dividend (if any) be stayed until further order of this court; and if, on sale of the mortgage security, a sum of money shall be procured beyond the maximum value already ascertained, the surplus shall be held by the assignee of this court for the benefit of the creditors of the insolvent, or as this court shall hereafter direct. The dividend to be postponed until the Master in Chancery shall have made his report. The claimants to be then prepared to show the court the maximum value of the security when the case comes on again.

*Re
EDWARD
BELL.*

1851.

*Mortgage
creditor—
Valuation of
security—Proof
for difference.*

COURT OF QUEEN'S BENCH.

November 4, 1851.

Re TAMERLANE v. BOWEN.

*Prohibition—Insolvency—Petition for protection—Debts under 300l.—
Mode of calculation.*

An erroneous decision in point of law, as the misconstruction of an act of Parliament, is not a sufficient ground for issuing a prohibition to the judge of an inferior court, even though his jurisdiction to deal with the case may depend upon that decision, when another immediate remedy is open to the applicant.

Where, therefore, a County Court judge decided that an insolvent trader owed debts to a less amount than 300l., although if his debts under a former petition were added to his present debts the amount would exceed 300l., the court

Held, that even if the judge were wrong in excluding the former debts from the calculation, they ought not to interfere by prohibition, as the applicant, who was a judgment-creditor, might enforce his judgment if the County Court judge proceeded without jurisdiction.

Re
TAMERLANE

v.

—
1851.

Decision of
Judge
Jurisdiction
Prohibition.

*Quære, whether under 5 & 6 Vict. c. 116, upon a petition by an insolvent trader for protection from process in ascertaining whether the debts are less than 300*l.*, the judge ought to take into calculation the debts still unpaid, from which the petitioner had some years before obtained a final order of protection.*

D. D. KEANE moved for a rule *nisi* for a prohibition to the judge of the County Court of Surrey, held at Dorking, to prohibit him from proceeding in the matter of a petition for protection, presented by the defendant, an insolvent trader, whose scheduled debts amounted to 241*l.* The ground upon which the application was made was, that the debts owing by the petitioner exceeded 300*l.*, there being still unpaid old debts to the amount of 217*l.*, from which the defendant had obtained a final order of protection upon his petition to the Bankruptcy Court in London in 1843. The judge of the County Court had held that the debts under the former petition were not to be taken into the calculation, and that consequently he had jurisdiction to entertain the present petition, and grant fresh protection.

It was now contended, that upon the true construction of the Insolvent Acts, all existing debts were to be calculated; and that the debts under the old petition were not extinguished by the final order for protection made in that case, though the remedy was barred.

LORD CAMPBELL, C. J.—But suppose that the County Court judge makes a mistake in this calculation, or even misconstrues the statute in respect to the mode of making it, is that any ground for a prohibition?

WIGHTMAN, J.—If the judge acts without jurisdiction the protection which he grants will be of no avail. You can enforce your judgment.

Keane.—It would be a hazardous experiment to issue execution, notwithstanding the order for protection.

LORD CAMPBELL, C. J.—I give no opinion upon the point whether the old debts ought or ought not to be reckoned; that is a question which the judge of the County Court must decide, and if he decides erroneously we are not to interfere by prohibition. You must be left to take any other remedy which the law gives you.

PATTESON and WIGHTMAN, JJ., concurred.

Rule refused.

INSOLVENT COURT.

PROTECTION CASE.

September 30, and November 13, 1851.

(Before Mr. COMMISSIONER LAW.)

Re HENRY SMITH.

Insolvent petitioning under 1 & 2 Vict. c. 110, before proceedings under the Protection Acts are terminated.

The court will not allow the process of discharge under the 1 & 2 Vict. c. 110, to be employed for defeating an adverse adjudication pronounced against the petitioner under the Protection Acts.

Changing a claim at the date of a petition from a judgment for costs into a judgment for debt by fresh process pending adjournment does not disable the court from granting protection and discharge in respect thereof under the 28th section of 7 & 8 Vict. c. 96.

R. obtained judgment against S. in an action for the infringement of copyright, the judgment being composed of damages and costs. S. becoming insolvent, has his final order adjourned sine die in respect thereof. An application for protection under the 28th section was enlarged generally upon the same ground. Pending this adjournment, R. brought an action upon his judgment for costs, which then became a judgment debt, for which S. was arrested, and committed to prison. Subsequent detainers having been lodged against him, he obtained leave to file a petition, under the 1 & 2 Vict. c. 110, but, upon the hearing, the court refused to adjudicate upon the new schedule until the debt belonging to the previous schedule was expunged.

Quære—Does a judgment for costs in an action, due at the date of filing a petition under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, upon an adjournment sine die, escape from the protecting power of the court, under the 7 & 8 Vict. c. 96, s. 28, by becoming upon fresh process in respect thereof a judgment debt?

Held, that the change in the nature of a judgment arising from the same claim will not affect the power of the court to protect and discharge under the 28th section.

September 30.

THIS insolvent applied to the court under the Protection Acts, on the 21st June, 1848, and at the first examination (July 14) he was opposed by Mr. Henry Russell, on account of damages and costs in an action which he had brought against the insolvent for singing certain songs, and infringing upon his copyright. Friday, the 4th August, was named for making the final order

Re (protection renewed.) On that day the consideration of the HENRY SMITH final order was adjourned by consent to November 3 (protection renewed), when the further consideration of the final order was 1851. adjourned *sine die* (protection not renewed.) In May, 1851, the *Change of claim* insolvent obtained leave to apply under the 28th section of —*Jurisdiction* 9 & 10 Vict. c. 96, for a protecting order, and ten days' notice —*Protection* to the opposing creditor and his attorney, and by advertisement *and discharge* in *The Times*, was ordered to be given. On the 17th June, 1851, his application under the 28th section was enlarged generally, and on the 16th July the application under the 28th section, was further enlarged generally. In May last the insolvent was arrested and committed to prison at the suit of Sims Reeves, who had obtained a judgment against him for services rendered. He then applied to the Chief Commissioner and obtained permission to file a petition under the 1 & 2 Vict. c. 110, and in his schedule he inserted not only his new debts, but the old debt of Russell, who had, prior to his petition under the 1 & 2 Vict. c. 110, successfully opposed an application by the insolvent for a protecting order under the 28th section of 7 & 8 Vict. c. 96. The insolvent to-day came up for his hearing.

Sargood, opposed for Russell, upon the ground that it was an application to get rid of an adverse judgment under the Protection Acts, and the insolvent was supported by

Cooke, who contended that, leave having been given to file the new petition, he was bound to insert the old debts in the schedule.

Mr. COMMISSIONER LAW intimated that the two cases were distinct, and he would not touch the present schedule until his old debts (in respect of which an adverse judgment was now pending) were struck out. He would deal separately with the other matter under the 1 & 2 Vict. that was now before him.

The learned Commissioner said, I cannot adjudicate in this matter, so long as the insolvent, by his counsel, insists upon retaining the creditors of a prior insolvency in the list of those against whom he is seeking the assistance of the court. It is urged, that he is bound to make the list a true list of all persons to whom there are unpaid debts; and that, therefore, it must include the creditors of prior insolvencies. This is a mistake. It is not even necessary, in noticing such prior insolvencies, to encumber the schedule with the names of creditors who belonged to them, and who are to be found in our past records. The scheduled list is to be a list of those who are parties to the insolvent's present suit in this court. Those former creditors are not parties to this suit. They have no concern in it. The rights and duties between them and the insolvent are not to be adjusted nor meddled with under this insolvency. He sought his advantages against them in a former suit; he seeks none in this. They took his property under a prior insolvency; and have no interest in any which may ever come to be administered under this. It would be absurd that their debts should swell the amount for which he is to execute the warrant of attorney. On the other hand, if, hereafter, he should

be wrongfully sued by such parties, he must insist on the protection which he earned by his former insolvency. This court, or any other court would be imposed upon, if, by the insertion of their names in the list now before me, it should be led to protect his rights, as if acquired under this insolvency. The law is sufficiently perplexed by the new protection system, without introducing further confusion by blending one insolvency with another. I have before insisted, that creditors under one, cannot, for the same debt, be creditors under another. This was where a protection insolvency came after a prison insolvency. Here the protection insolvency preceded, and we are now on a petition under 1 & 2 Vict. c. 110. The notion that the law requires the insertion of "all creditors," in the largest possible sense of the term, is essentially the same notion that would introduce the creditors of a former insolvency as helping to compose the 300*l.* owing by a trader, when he comes for protection. I say, as before, that the notion is perverse. If the universality of the term "all creditors," is to embarrass us, let it embarrass us always throughout the act. It must then control us as to the opposition at a hearing, and in the adjudication made on the merits of that opposition. The result will be, that a man who suffered for two years on account of fraud in his first insolvency, will be liable to two years more for the same fraud under his second insolvency; and the same again, if he should ever incur a third; the period in each case running from the date of the then present petition. This monstrous consequence must be maintained by those whose whole argument has hitherto been, "a debt is a debt," and "a creditor is a creditor." The only peculiarity in this case of Henry Smith is, that the former insolvency has not yet arrived at a protecting order, the case being under adjournment *sine die*. This does not release the case from the principle which has been laid down, namely, that the rights of the parties are to be adjusted only under the insolvency to which they belong. The prior insolvency concerned all creditors who were so at the time when it was petitioned for. This insolvency concerns those who became creditors since that time. No incidents of either insolvency can set aside this essential distinction. Nothing can give the new creditors a right to share with those of the prior list. In the summer of this year, a creditor on the prior insolvency arrested this party; and he was soon after detained at the suit of a new creditor, for he had contracted debts since his former petition. It is this last detainer which alone qualifies him to file the present petition; and I am ready to deal with the merits of it. But in so doing I will not touch the merits of the former case. On those merits I will hear neither party. I listen to the objection of him who says that he is not to be brought before the court again by reason of this new proceeding. This attempt is perhaps made in the notion that I may require the creditor who before substantiated his case, to prove the same matter of opposition again under this new petition, and in the hope that he may be tired out and fail to do it. This, indeed, must be the object;

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HENRY SMITH.
1851.
Change of
claim—
Jurisdiction—
Protection and
discharge.

Re
HENRY SMITH.

—
1851.

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Change of
claim
—
Jurisdiction
Protection and
discharge.

for if he should come and make his proof, no advantage would accrue to the insolvent; the adjudication would be unfavourable to him. There might, however, be this absurd incident; that if this court should issue its warrant to discharge after two years under the present insolvency, the Queen's Bench, or other committing court, would have to issue its warrant to discharge from the same detainer at the end of one year, under the first insolvency. It has been said that, as the former case still stands adjourned *sine die*, I may adjudicate in the present petition between the insolvent and the prior creditors, as we do where a case is adjourned *sine die* in bankruptcy. The cases are very different. In that case there is no new failure or insolvency; and, therefore, no offence to the principle of keeping distinct an earlier and a later insolvency. If a man is already before the Court of Bankruptcy, where his liberty can be dealt with, as well as his property, we do not think it right to anticipate the decision of that court by entertaining his petition for liberty, which alone we can deal with while the bankruptcy stands. But when that court has refused to give any judgment at all, by adjourning the examination *sine die*, we often hear and adjudicate on the merits; and for this reason, that a man is not to be imprisoned for life. Whatever be the fitness of this practice, any question upon it wants analogy to the question in this case. There the question would concern a conflict of administrations in regard of one and the same insolvency; one property to be surrendered; one list of creditors. It would not concern two successive failures, the latter showing new property and new creditors. Moreover, the ground which indicates our proceeding in the petition of one who is adjourned *sine die* as a bankrupt, does not exist in a case which has been adjourned *sine die* under the Protection Law. A man is not left to be imprisoned for life. As to any existing detainer, it cannot last more than a year; at the end of that time, the court which committed must discharge. As to the liability to arrest by the others, this too is not perpetual, although the term *sine die* must be employed. By the provisions of the Protection Statutes, this court is not to pronounce a judicial sentence, saying when a man shall have his liberty, or why it is delayed. Where there has been misconduct, we are simply to abstain from judgment. We are required, however, notwithstanding that misconduct, to entertain the question again, having a discretion, by hearings from time to time, to decide when the continuing risk of imprisonment may be relieved. If a commissioner here, on a case fully heard, should pronounce on the ground of past misconduct, that, notwithstanding imprisonment, it shall remain adjourned for ever, and that he will never listen to an application under the 28th section, the danger of perpetual imprisonment would then arise. But the remedy would be, not in filing a fresh petition under the other statute, and claiming to merge one insolvency in another. It would be in an application for *mandamus*. So long as the schedule before me is framed to blend the two

insolvencies of this party as it does now, I cannot swear him to the truth of it, nor proceed to adjudication.

The learned Commissioner made the following indorsement on the schedule "On hearing the insolvent by his counsel, who claims an adjudication in respect of the creditors under the former insolvency, as well as in respect of new creditors. This I refuse to give."

*Re
HENRY SMITH.*

1851.

*Change of
claim—
Jurisdiction—
Protection and
discharge.*

Adjourned generally.

The insolvent went back to prison.

November 13.

An application was made to the court in the case of this insolvent for leave to come up for a hearing without expunging one of the judgment debts upon which he was detained in custody. The matter was before the court on the 30th September, when the learned Commissioner decided that the claim of Mr. Henry Russell for costs consequent upon an action for infringing the copyright of some songs, and to escape which Mr. Smith had petitioned under the Protection Acts, did not by fresh process upon the claim become a new debt, and consequently belonged to the protection insolvency. He, therefore, declined to deal with the new insolvency under the 1 & 2 Vict. c. 110, until the debt was expunged. This his attorney, Mr. Nicholls, refused to do, as he was of opinion that, as the insolvent had to swear to the truth of his schedule, he would be wilfully perjuring himself if he knowingly omitted any debt.

Nicholls, to-day, insisted that as the insolvent would be swearing falsely if he omitted this debt, he was bound to insert it in his present schedule under the 1 & 2 Vict. c. 110. He had been offered an adjudication in respect of the other debts, but he could not stand by and see the insolvent swear falsely.

Mr. COMMISSIONER LAW said—I abide by the opinion which I have before expressed so amply as not to need repetition, namely, that the matters of one insolvency are not to be blended with those of another. It is useless, therefore, that I should bring the parties before me again, unless the list of creditors whom I have to deal with is relieved of those who belong to a prior petition. An additional point has been urged now which was not made before, viz. that the detainer of Mr. Russell cannot be dealt with under the first petition, and must therefore be dealt with under the new petition. This is a very proper question to be considered. My opinion is, that that detainer is to be dealt with under the first petition; and I shall so deal with it. The protection laws require, as the mode of dealing with an unsatisfactory case, that we should not pronounce our judgment on hearing it, but defer our decision by adjournment. It will often happen, that creditors in the interval commence actions, and bring them to maturity. A speedy contract or specialty debt becomes a judgment debt before the time arrives for giving a permanent protection. So, in the same interval, a new action may be brought upon

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HENRY SMITH.
1851.
*Change of
claim—*
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*Protection and
discharge.*
a judgment already obtained, and a new judgment signed. It is my opinion that such proceedings do not remove these creditors and their claims from the scope of our jurisdiction, so as to drive the debtor afterwards to a new insolvency, but that the order of protection ultimately given can affect such claims in the new shape which they have assumed; and consequently that, if the insolvent is detained under any fresh process in respect of them, he is entitled to our warrant to discharge him. That order is, by the words of the 28th section, "an order to protect the petitioner from being taken or detained under any process whatever for or in respect of the several debts and sums of money due, or claimed to be due, at the time of filing his petition to the persons named as creditors for the same." Now, the process for the 159*l.* under which the insolvent is in custody, is process in respect of the 159*l.* which was due at the time of filing his petition under the Protection Act; at that time this sum was nearly all costs; now it is all debt; but the detainer is under process for the same sum of money, and he will be entitled to discharge from that detainer when the protecting order shall be made. The right view of the subject cannot depend on the convenience of the insolvent in the particular instance: here the insolvent would rather that I should repudiate the jurisdiction of which I speak; cases will more commonly happen, where the debtor would be prejudiced by my not exercising it. Accordingly on this new point, I say that a claim does not escape from the protecting power of this court, either because, while the case is pending here, a simple contract debt becomes a judgment debt, or because a judgment debt for costs, becomes a judgment debt without costs. One instance only there is, such as we heard of this morning, in which by a new action the debtor's hope of personal liberty may be defeated—a man who has got a judgment in the Queen's Bench, finding the defendant to be petitioning in insolvency, hastens to the County Court with an action on that judgment; and, by so shifting his security from Westminster Hall to Shoreditch, acquires a power of imprisonment against which bankruptcy and insolvency will not be available.

Application refused.

INSOLVENT COURT.

(Before Mr. COMMISSIONER LAW.)

*May 2, 1851.**Re WILLIAM STENT, the elder.**Commitment—Jurisdiction.*

Where an insolvent out on bail is arrested under a commitment of a County Court, prior to the date of the petition, this court cannot interfere.

THE Governor of Whitecross-street Prison, Mr. Burdon, applied to the court for directions how to act in a case in which an insolvent out on bail had been arrested and brought to the prison in custody.

Mr. COMMISSIONER LAW, after inspecting the order of commitment, observed—The arrest bears date before the vesting order, and of course it is one against which we cannot protect.

INSOLVENT COURT.

June 13, 1851.

(Before Mr. COMMISSIONER PHILLIPS.)

PROTECTION CASE.

*Re CHARLES HIPPOLYTE MANSELL, otherwise
VICOMTE DE SECQUEVILLE.**Discharge ad interim under 7 & 8 Vict. c. 96, s. 6.*

Creditors may oppose a petitioner's application for a discharge ad interim, upon the grounds of opposition enumerated in sect. 24 of the 7 & 8 Vict. c. 96, and the court will act upon these grounds of opposition there enumerated, not only upon "the day from the first examination" but also upon the preliminary application in the case of prisoners for a discharge ad interim.

THIS insolvent applied for his discharge *ad interim*, under the 7 & 8 Vict. c. 96, s. 6.

Cooke opposed the application upon the ground that he had contracted debts without reasonable expectations of payment. He had borrowed money for railway speculation.

The insolvent had no counsel.

Mr. COMMISSIONER PHILLIPS said, a question had been raised whether he could take notice of the grounds of opposition enumerated in the 24th section upon this application, but it seemed to him a very circuitous and idle route to give a man his discharge one day for the purpose of remanding him the next day. If it were a case in which he could not name a day for a final order it would be idle to discharge the petitioner to-day, and remand him back into custody a few days after upon the first examination. He should therefore refuse the application.

Application refused.

INSOLVENT COURT.

June 14, 1851.

(Before Mr. COMMISSIONER PHILLIPS.)

Re JAMES PARSONS.

Vexatious defence.

*Where an insolvent's attorney pleaded to gain time :
Held, that the insolvent is responsible for the extra costs occasioned by the
vexatious defence.*

THIS insolvent appeared for his hearing, when a creditor opposed and proved a vexatious defence of an action brought by him against the insolvent for the recovery of his debt.

The insolvent, in extenuation, observed that his attorney pleaded to gain time.

Mr. COMMISSIONER PHILLIPS said it had been ruled in so many cases that this was no answer to the vexatious defence of an action, that it was quite unnecessary to refer to them. The court had altogether repudiated the notion that the insolvent was not responsible for the act of his attorney.

Remanded for a vexatious defence.

INSOLVENT COURT.

August, 1851.

(Before the CHIEF COMMISSIONER.)

*Re THOMAS DOWN.**County Court order—Jurisdiction.*

A., an insolvent debtor, received his current pay as a warrant officer between the date of his vesting order and his discharge under the 1 & 2 Vict. c. 110, and spent the whole in the support of himself and his children :

It was held by the judge of the County Court that A. was not entitled to his discharge until the whole sum so expended was paid to the official assignee for the creditors.

Held, that this cannot alter or amend the adjudication of the judge of the County Court.

STURGEON called the attention of the court to the case of Thomas Down, an insolvent debtor, who was recently heard before Mr. Gale, the judge of the Hampshire County Court, with a view to ascertain whether the court could further the liberation of the insolvent, who was likely to be detained in prison a very long time, perhaps years, in consequence of what might be considered an injudicious and hasty order of the judge. The insolvent was a boatswain and master rigger in the navy, and he had received a sum of 42*l.* being his current pay from the Board of Admiralty, after the date of his vesting order, and had expended it in the necessary support of himself and family. The judge of the County Court held that as all his property before his discharge vested in the provisional assignee, he had no right to expend the money, and pronounced an adjudication of discharge conditional upon his repaying the entire sum to the provisional assignee. This man had no means whatever of paying that sum, and might in consequence have to remain in prison for years. He feared there was no appeal, and if so that was the fault of the Legislature, which was more apt to multiply acts of Parliament than to provide the means of superintending the machinery which was to carry them into operation.

Nichols (amicus curiae) said, that there were cases in the books to show that the full pay of an officer could not be assigned.

Sturgeon.—This was the full pay of an officer received between the vesting order and the discharge. There was no fraud, no concealment, and it appeared to him a mistake in the mind of the judge. He had remonstrated at the time, but Mr. Gale said you can apply to the court above.

The CHIEF COMMISSIONER read sect. 56:—“ Nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being, or having been, an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of Her Majesty, in the customs, or excise, or any civil office, or other department whatsoever, &c. to the pay, half pay, salary, emoluments or pension, of any such prisoner for the purposes of this act.”

Sturgeon.—There were no reasons given for this order. They could not appeal to this court, nor had they, as it appeared to him, any other mode of relief. If they applied for a *habeas*, the return would be an apparent order within the limits of the jurisdiction.

The CHIEF COMMISSIONER.—It is not a making away with property, because it was property coming after the vesting order.

Sturgeon.—Supposing it was property improperly made away with, the judge was bound to remand for that offence for a definite time. This officer might not be able for years to pay a sum of 42*l.* It was no preference, as it was spent upon himself and children.

The CHIEF COMMISSIONER observed,—I do not see how I can help you.

*Re THOMAS
Down.
—
1851.
—
Order of
County Court
judge—
Jurisdiction.*

JUDGES' CHAMBERS.

July 3, 1851.

(Before Mr. JUSTICE WILLIAMS.)

TURNER *v.* WILKS AND ANOTHER.

Protection Statutes—Imprisonment of debtor beyond twelve months—Discharge of insolvent.

By the 7 & 8 Vict. c. 96, s. 28, it is enacted, "that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition."

The Insolvent Debtors' Court refusing to discharge an insolvent petitioner who had been in custody more than twelve months:

Held, by Williams, J., after consulting Parke, B., that a judge at chambers may discharge him.

THE insolvent, the defendant in the action, filed a petition for protection under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, in the Court for Relief of Insolvent Debtors, and came up for his examination before Mr. Commissioner Law, on the 19th of April, 1850, when he was opposed by the plaintiffs in this action, and a day was named for making the final order. On the last-named day the insolvent was again opposed, and the learned commissioner (Law) adjourned the case *sine die*, without protection. On the 11th of May, 1850, being the day after the last examination, the insolvent was arrested in execution in the action, and committed to the debtors' prison. After the lapse of about six months, an application was made to the learned Commissioner to grant him a protecting order under the 7 & 8 Vict. c. 96, s. 28, but the application was refused. Subsequent applications were made but were attended with the same result.

Lewis now applied for the discharge of the insolvent, the defendant in the action, out of custody, upon affidavit of the foregoing facts, and also that more than twelve months had elapsed since the filing of the petition and the final hearing of the petitioner.

Martin, the plaintiff's solicitor, opposed the application.

WILLIAMS, J., doubted his power to discharge the insolvent.

Lewis admitted that he had no precedent, but relied entirely upon the words of the statute. Perhaps his lordship would be good enough to mention the nature of this application to Parke, B., who was also at chambers.

WILLIAMS, J., acceded to this request, and immediately consulted with Parke, B., after which he returned, and made an order for the insolvent's discharge, grounded upon the affidavit and the words of the act of Parliament.

The insolvent was accordingly discharged.

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v.
WILKS
AND ANOTHER.

1851.

*Imprisonment
beyond twelve
months—
discharge.*

JUDGES' CHAMBERS.

August 9, 1851.

(Before Mr. JUSTICE PATTESON.)

SHEPHERD *v.* GEORGE DE LA POER BERESFORD, Bart.

Operation of the Irish Insolvent Debtors' Act in England—Discharge in Ireland from English debts—Effect of in England.

Held, that a discharge under the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 10, operates as a bar to debts due from the insolvent in Ireland and also in England.

THIS was an application for a discharge of the defendant, Sir George de la Poer Beresford, bart., from the custody of the Sheriff of Middlesex, upon the ground that he had been discharged from the debt for which he was arrested by the Irish Insolvent Debtors' Act.

Judgment was signed in the action *Shepherd v. George de la Poer Beresford, bart.*, prior to the discharge in Ireland, and a *ca. sa.* issued also before the discharge, and was renewed afterwards for 1426*l.* 1*s.*; but before the defendant was arrested in this action, he was arrested upon another proceeding in Ireland, and became a prisoner for debt in the gaol of the Four Courts Marshalsea, in Ireland, and while there he filed a petition under the Insolvent Debtors' Act, 3 & 4 Vict. c. 107, on the 7th September, 1843, and was duly discharged on the 9th May, 1845. Subsequently he came to England, and for the last fifteen months had resided here until he was arrested on the 5th August last upon the original judgment obtained in the Court of Common Pleas. An affidavit of these facts was sworn on the 7th August, 1851, and

Lewis now applied for the discharge of the defendant out of custody, he having been arrested for a debt from which he

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had been discharged by the law of Ireland. He produced the original adjudication under the Irish Act, in which the plaintiff's name duly appeared in the list of creditors. He relied upon *Ewart v. Jones*, 14 Mees. & W. 784; 31 L. O. 115, in which it appeared that Maule, J. had directed a discharge under similar circumstances, and an action was brought by the defendant against the plaintiff for having arrested him at all. The Irish Act (s. 61) provided for notice to be given to creditors in England, and there could be no object in that unless the Legislature meant the discharge to apply to debts incurred in England.

PATTESON, J. observed, upon looking into *Ewart v. Jones*, that there was a Newfoundland case, which decided that a certificate of an insolvent obtained in Newfoundland is a bar to a debt contracted in England previous to the insolvency. (a)

Gibbons, for the plaintiff, said that the affidavit did not show the plaintiff was named in the schedule. In fact, there was not a word about the schedule and the adjudication, and an insolvent was only protected in respect of debts inserted in the schedule.

Lewis said that the form of the old Insolvent Acts were somewhat different from the present, and the adjudication formally enumerated the creditors from whose demands the insolvent was discharged. With respect to the affidavit it said that the insolvent was opposed at his hearing in respect of this creditor's debt, and that the debt for which Sir George Beresford was now arrested was the same as that inserted in the adjudication.

PATTESON, J.—The affidavit says it is the same debt as appears in the adjudication. They have arrested this gentleman with their eyes open. They must have known that they had no right to arrest the defendant.

Gibbons said, that the act expressly enacted that it should not extend to Scotland or England, except where otherwise mentioned.

Lewis said, that there was an express decision on that point.

PATTESON, J.—Where was judgment recovered?

Lewis.—It is an English judgment.

PATTESON, J.—I am called upon to set aside a writ issued upon an English judgment.

Lewis.—In *Ferguson v. Spencer*, the objection that the act should not extend to England was considered and overruled. (b) In *Stein's*

(a) *Philpots v. Reed*, 1 Brod. & B. 294.

(b) In 1840—*Ferguson v. Spencer*, 2 Scott's N. C. 229—525. The assignees under an Irish commission of bankrupt (under 6 & 7 Will. 4, c. 14), may maintain an action here to recover a debt contracted with the bankrupt in this country. And a certificate under this statute operates a bar as well of debts due from the bankrupt in England and Scotland, as of those incurred by him in Ireland.

In this case it was contended that a certificate under the Irish Bankrupt Act was no bar to an action for a debt contracted here, but the Chief Justice (Tindal) held that it was.

F. Kelly, in Hilary Term, 1839, obtained a rule for a new trial, having cited *Jeffery v. M'Taggart*, 6 M. & S. 126 (decided in 1817.)

The *Solicitor-General*, and *Manning*, Serjt. (in Michaelmas Term) showed cause.

F. Kelly and *Bramwell*, in support of the rule.

After having taken time to consider,

TINDAL, C. J., delivered the judgment of the court, and intimated that their opinion was

case, 1 Rose, 476, it was held that an English commission carried property in Scotland, and that the English certificate discharged the Scotch debts. (c) In *Rattray v. White* the Scottish judges overruled the objection that the English Insolvent Act did not extend to Scotland, and held that it transferred heritable property in Scotland to the English assignees. (d) In *Edwards v. Ronald*, 1 Knapp's Privy Coun. Cas. 259, it was held that a certificate obtained in England is a bar to debts previously contracted at Calcutta, although the creditor had no notice of the fiat, and was resident at Calcutta.

PATTESON, J.—The question is whether the Irish Insolvent Act does not discharge the insolvent from this English debt. I think it does, and if I do not discharge him no one else will.

Gibbons contended that the Irish Act only applied to Irish judgments. He was a prisoner for debt in Ireland, and he petitioned the Insolvent Court to be discharged from debts within its jurisdiction.

PATTESON, J.—The Irish act vests the defendant's property in England.

Gibbons.—Yes, my lord, but the question is, what is the benefit of the act?

Lewis said that the 61st section expressly directed notice of the insolvency to be given in England.

that the certificate obtained under the Irish Commission by the bankrupt barred all his liabilities both as to his Irish and his English creditors. The court thought the point had been decided by two cases in the Irish court: (*Tronson v. Callan*, in the Court of King's Bench in Ireland, 1 Hudson & Brooke, 113; and *Rogers v. Love*, in the Irish Court of Exchequer, 1 Hudson & Brooke, 484, n.) In the former case (*Tronson v. Callan*) the question arose under 6 Geo. 4, c. 16, and it was held that the assignees under an English fiat might sue in Ireland for a debt contracted there; and in the latter case (*Rogers v. Love*) it was held that an English certificate was a bar to an action for a debt contracted in Ireland. The 135th section of 6 Geo. 4, c. 16, contains a restriction against the extending of the English statute either to Scotland or Ireland in terms precisely similar to those employed in the 161st section of the Irish Act; and yet, observed Lord Chief Justice Tindal, notwithstanding the restrictive clause, the Court of Queen's Bench in Ireland held that the debts in Ireland due to the bankrupt vested in the assignees under the English commission.

(c) *Royal Bank of Scotland v. Scott, Smith, and Co.*—John and Robert Stein, T. Smith, R. Smith, and J. Stein carried on business as bankers and insurance brokers in Edinburgh, under the firm of Scott, Smith, Stein, and Co. They were also partners in a trade in London, under the firm of Smith, Stein, and Co. The Scottish firm became bankrupt in 1812; the English firm was also insolvent of course. In August 1812, a commission of bankruptcy issued in England against the partners described as carrying on trade in Fenchurch-street, London, under the firm of Smith, Stein, and Co., and a provisional assignment was executed the same day. The Royal Bank of Scotland holding two bills of the Scottish firm, made the company bankrupt, and applied for sequestration, but not till after the English commission was issued. The question was, whether the English commission excluded the Scottish sequestration by priority. On the part of the bank, we had no conception of questioning the doctrine of *Strothers* and *Reid's* case, which would have been very desperate; but the distinction we took rested on the difference between the case of an individual and that of a company, the former having necessarily only one domicile, the company having in this case manifestly two, one in England and one in Scotland; having distinct sets of creditors in those two countries, who gave them credit as separate and distinct companies, and who were entitled to rely on the bankrupt laws, and the course of administration and payment therein prescribed, as one of the grounds of their credit. This distinction, however, was not held sufficient to ground a different determination from that given in the case of *Strothers*, and the court therefore stopped the Scottish sequestration: (Buchanan's Cases, 320; 1 Rose, 463.)

(d) See this important case decided under the existing English Insolvent Act, fully reported in Macrae's Insolvent Practice, p. 311.

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Gibbons.—If the defendant signed a warrant of attorney to confess judgment in Ireland that would not be a charge upon lands here. There could be no charge upon his future property here under the warrant of attorney. The 81st and 82nd sections must be read with reference to Irish judgments and Irish courts unless otherwise declared. There was not a single word in these sections that he should be protected from English process under English judgments. *Phillips v. Allan* (8 Barn. & Cres. 477), was a discharge under the *cessio bonorum* in Scotland, and it was held to be no discharge at all in England.

Lewis.—That was overruled in *Jones v. Anstruther*. (See Manning and Grainger's Reports.)

Gibbons.—That is a Scotch sequestration.

Lewis.—Well, that is the same. The 79th section of the act makes the property of the insolvent "in Ireland and elsewhere" liable.

Gibbons referred to Story's Conflict of Laws, to show that there were cases which fell short of a full discharge. There were also several cases in which the court had said that they would not interfere summarily, but leave an insolvent to plead his discharge. This was a doubtful point, and he submitted that it ought to be discussed before the full court. He submitted that the insolvent was not protected from arrest here by the discharge in Ireland, and if there was any doubt, that his lordship would not discharge him summarily.

PATTERSON, J., said it was clear that the Irish Insolvent Debtors' Act vested all the defendant's property in England in the Irish assignees for the benefit of the creditors, and it would be monstrous to suppose that, when all his English property was taken away, he was not to be protected here. The just principle, as it appeared to him, was, that a man should be protected to the extent to which his property vested; and if his property in this country vested for the benefit of all his creditors, he ought certainly to be protected here. If this act was permitted to operate upon Irish property only, then he could understand why he should not be protected in this country. There was not an argument, nor the shadow of an argument, to detain this defendant longer in custody, except these words, "shall not extend to England or Scotland, except where otherwise expressed," but that has been several times before the Superior Courts in this country, and in Scotland and Ireland, and, after full consideration, overruled. He was obliged to act as the statute directed that, if the insolvent was arrested, he must apply to the court out of which the process issued for his discharge.

The defendant was discharged from the detainer in this action, and, in the course of the following Monday, from fifteen other detainers, his lordship being satisfied with the argument in this case. Each party paid his own costs.

INSOLVENT COURT.

August 18, 1851.

(Before Mr. COMMISSIONER LAW.)

*Re JAMES ELLIS.**Bail—Opposition—Privileges of attorney.*

The rule of instruction by the court respecting oppositions by attorneys, upon application of insolvents to be admitted to bail till their hearing, under 1 & 2 Vict. c. 110, is thus endorsed upon the "Original notice of sureties":—"Any creditor by himself, by counsel, or by his attorney or attorney's agent may there object to the proposed sureties, or otherwise object to such application."

Held, that an attorney not being an attorney named on the record, or the agent of such attorney, could not be heard.

THIS insolvent, lessee or proprietor of Cremorne Gardens, T applied to be admitted to bail till the day appointed for his hearing.

Bursell (an attorney) appeared to oppose for Mr. Thomas Foulkes, detaining creditor.

Cooke, for the insolvent, objected that Mr. Bursell was not the attorney named on the record, or his agent, and therefore he was not entitled to oppose.

Bursell said, in reply to the learned Commissioner, he certainly was not Mr. Foulkes' attorney in the action, nor the attorney's agent; but he had lately been employed by him in professional business as his attorney; and meeting him that morning, he had instructed him to oppose on his behalf.

Mr. COMMISSIONER LAW observed, that he was not aware whether this point had ever been discussed. The matter should be considered upon principle.

Cooke referred to the invariable practice of the court, and continued—It was not competent for a man to meet any attorney in the street, and say, Go and oppose for me. There would be nothing to show that an attorney so situated was properly instructed, and it might lead to great abuse. He should, at all events, come there fortified with something in writing to show that he was authorized to appear. There had been no order of the court to change

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attorneys in the action upon which insolvent was detained in custody.

Bursell contended that when a judgment was recovered there was no necessity for a change of attorneys by rule of court. The rule of court recognised agents. He could appear in the same way as Mr. Foulkes.

Cooke said there was a case many years ago before the Chief Commissioner. Mr. Lewis was agent of a country attorney, and as such he appeared to oppose the bail. His privilege to oppose was questioned, as the attorney for whom he appeared as agent had an agent in London in common law matters. The Chief Commissioner declined to allow Mr. Lewis to oppose.

Mr. COMMISSIONER LAW enquired why had the Chief Commissioner refused to hear Mr. Lewis?

Cooke.—Because he did not come strictly within the phrase in the rule "Attorney's agent." Mr. Lewis had not done the business in the action upon which the insolvent was detained. This was the case in the present instance. This gentleman was neither the attorney upon the record, nor the attorney's agent. The privilege to oppose bail was an indulgence to the attorney upon the record, and to him only, and not a general permission to the detaining creditor to employ whom he pleased. He was just informed that this gentleman could not get the discharge of the insolvent in this action, not even by the consent of the client without the consent or authority of the attorney upon the record.

Bursell said that it was so if the costs of the attorney on the record had not been paid; but if his costs had actually been paid, an action would lie against him if he refused to consent.

Mr. COMMISSIONER LAW said, the only matter that had caused him to doubt at all the propriety of excluding this gentleman from the privilege of opposing for the creditor under these circumstances, was the suggestion that it might happen that the proceedings in an action might be of some standing, and the communication between the attorney and client might have ceased, and therefore it might not be reasonable to require the client to apply to the same attorney. Supposing there might be a case of that kind, it had nothing to do with this case. The reason why they allowed attorneys to appear without counsel, was not that the court allowed attorneys to usurp the province of the bar as they did in some places, but the reason of the exception was, that it was in favour of liberty. As the time was too short to instruct counsel, attorneys were permitted to appear, and under such circumstances it was reasonable that they should be allowed to do the business in person. That was the reason, and the only reason, why they allowed attorneys to transact business upon these occasions akin to the business of the bar. It was true that attorneys appeared upon dividends, proof of debts, and so on, in business which resembled the old bankruptcy business, and it was not unreasonable that they should be allowed to appear in matters of account, &c.; but in the trial of

an issue they did maintain the privilege of the bar. He thought that this gentleman should not be allowed to oppose.

Opposition by Mr. B. disallowed.

Mr. COMMISSIONER LAW observed that this had been a discussion limited in its extent, as it only concerned detaining creditors and their attorneys and agents, and therefore all other creditors who have not sued must be at liberty to employ any person they please.

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INSOLVENT COURT.

(Before Mr. COMMISSIONER LAW.)

August 18, 1851.

Re THOMAS FULLER.

Attorney's Clerk.

The attorney for the creditor may oppose bail, but not his clerk.

THIS insolvent came up for bail, and the clerk of the creditor's attorney appeared to oppose.

Mr. COMMISSIONER LAW intimated that a clerk could not appear. The creditor himself then conducted his own case.

INSOLVENT COURT.

August 18, 1851.

(Before Mr. COMMISSIONER LAW.)

*Re JOSEPH BRIE.**International law—Jurisdiction.**The court will not take notice of service on French creditors.*

THIS was an application to be admitted to bail till the hearing.

Mr. COMMISSIONER LAW, upon looking into the schedule, observed that all the creditors were in France, at Paris.

Lewis said that the question of the effect of the discharge under the Insolvent Acts in Ireland had lately been discussed before Patteson, J., at chambers, and he had given effect to a discharge in Ireland.Mr. COMMISSIONER LAW.—Ireland and France are not the same thing. The act requires an advertisement in *The London Gazette*. How long has the insolvent been in this country?*Lewis* said since 1848.

Mr. COMMISSIONER LAW.—He was bankrupt in Paris just before, in 1848.

Lewis.—Yes; the debts in the schedule are the debts of that bankruptcy.

Mr. COMMISSIONER LAW.—The people living abroad have had no notice. (a) Our rules do not embrace those creditors. If they did, they would not have five days' notice. If the court thought they were to have notice, they would not have named five days for them.

Lewis said that the communication between the countries was now so rapid, that he would undertake they should all have notice.

Mr. COMMISSIONER LAW.—I take no notice of service on French creditors, late or not late. The services here are regular.

Bail allowed.[NOTE.—A bankrupt who has assigned his property to his assignees under a French commission of bankruptcy, cannot afterwards be sued in the British dominions for a debt proved under it: (*Quelin v. Moisson*, 1 Knapp's Priv. Coun. Cas. 259.)]

(a) In point of fact the French creditors had notice, but what the learned Commissioner meant was, that as the rules did not embrace a provision for service on these creditors, he should decline to take notice of such services. This will be evident from the context.—REP.

JUDGES' CHAMBERS.

October 17, 1851.

(Before Mr. BARON PLATT.)

LONGBOTTOM *v.* STOKES.*Operation of the Irish Insolvent Debtors' Act in England—Discharge in Ireland from English debts—Effect of in England.**Held, that a discharge under the Irish Insolvent Debtors' Act, 3 & 4 Vict. c. 107, operates as a bar to debts due from the insolvent in Ireland, and also in England.*

THE plaintiff, in this action, was a butcher at Herne Bay, and the defendant, a surgeon, also resided there. In 1848 defendant became indebted to Mr. Longbottom, who sued and obtained judgment against him for the amount. Last year the defendant went to Dublin, and while there he took the benefit of the Irish Insolvent Debtors Act, and inserted William Longbottom in his schedule as creditor for 29*l.* The usual notice required by the act was duly served, and the insolvent discharged. He subsequently returned from Dublin, where he had been relieved from his debts, to Herne Bay, where he was arrested by the plaintiff on the judgment he had obtained, and thrown into Maidstone Gaol. A summons was issued on his behalf, to show cause why he should not be discharged from the custody of the sheriff, upon the ground that he had been discharged from the debt in Ireland.

Lewis attended to-day and made the application, relying upon the decision of Patteson, J. in *Shepherd v. George de la Poer Beresford, bart.* (*ante*, p. 251.).

Burt, attorney for the plaintiff, submitted that this case differed from that cited. In this case the debt was contracted in England, and the defendant went to Ireland.

Lewis produced the adjudication under the Irish Insolvent Act, from which it appeared that the defendant was duly discharged on the 27th of July, 1850, and that plaintiff's debt was inserted. The schedule was also produced wherein the debt due to the plaintiff was duly set forth.

Martin, B. after referring to *Shepherd v. Beresford*, expressed his concurrence with the opinion of Patteson, J. and that the defendant was entitled to his discharge.

Discharged accordingly.

COURT OF EXCHEQUER.

November 4, 1851.

DAVIES v. EDWARDS AND ANOTHER.

Statute of Limitations—Promissory note—Payment of dividend by assignees of insolvent, whether a part payment.

One of three makers of a joint and several promissory note having become insolvent, the name of the plaintiff as holder was duly inserted in his schedule, and a dividend was subsequently paid to him by the assignee of the insolvent in respect of the note.

Held, that this was not a part payment to take the case out of the Statute of Limitations as against the other makers.

A SSUMPSIT by the plaintiff as the executor of one H. J. against the defendants, to recover a balance of principal and interest due upon a promissory note made by them and one Marsden. The only material plea was the Statute of Limitations.

At the trial, before Pollock, C. B., at the sittings in Middlesex, after Trinity Term last, it appeared that the note in question was a joint and several promissory note, given by the defendant and one Marsden, dated January 13, 1844. In 1848, Marsden took the benefit of the Insolvent Act, and the note and the name of H. J. were duly inserted in the schedule, and in November, 1848, a dividend of 2*l. 2s. 11d.* was paid by order of the Insolvent Debtors' Court, as a dividend upon this note. His lordship ruled that this was not sufficient to take the case out of the Statute of Limitations, and the plaintiff was accordingly nonsuited, with leave to move to enter a verdict for the amount claimed.

Edwards now moved accordingly.—It has been decided that a payment of a dividend under a commission of bankruptcy, against one of two joint makers of a promissory note will take a case out of the statute: (*Jackson v. Fairbank*, 2 H. Black. 343.) In *Brandram v. Wharton* (1 B. & Ald. 463), the payment of a dividend was indeed held not to have this effect; but that was because the proof had been in respect of the consideration of the note, and not upon the note itself. [PARKE, B.—A part payment must be a payment of part, accompanied with a promise to pay the residue.] Under the Insolvent Acts, the insolvent's estate remains liable for the whole of his debts. Therefore, the insertion of this debt in the schedule did admit a liability from which a promise to pay the residue may be implied: [ALDERSON, B.—Part payment

by one joint contractor, makes both liable for the residue, but here the condition of the payment is, that the defendant is not liable to the same extent as he was before, and you want to make that a good payment to bind his companions.] *Jackson v. Fairbank* has never been overruled, and this is a stronger case. In *Atkins v. Tredgold* (2 B. & C. 23), where the payment of interest by the surviving maker was held not to take the case out of the statute as against the executor of his co-contractor, the reason was, that the joint nature of the debt was severed by the death; and that decision does not affect this case.

PARKE, B.—I am of opinion that there should be no rule in this case. The 9 Geo. 4, c. 14, requires a promise to be in writing to take the case out of the Statute of Limitations; but it provides that “nothing therein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever.” The question is, therefore, whether there has been such a payment as will take this note out of the Statute of Limitations, with respect to the present defendants. This subject was not so fully considered in *Jackson v. Fairbank* as it has been since. The principle is now laid down, that to constitute a part payment to take a case out of the statute, it must be a payment on account of a larger sum admitted to be due, accompanied by a promise to pay the remainder. This was established in *Tippets v. Keane* (3 L. J., N. S., 281, Ex.), in which I delivered the judgment. I am there reported, and I dare say correctly, to have said—“In order to take a case out of the Statute of Limitations by a part payment, it must appear, in the first place, that the payment was made on account of the debt. Secondly, it must appear that it was made on account of the debt for which the action was brought. But the case must go farther, for it is necessary in the third place, to show that the payment was made as part payment of a greater debt; because the principle on which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment, and, unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt.” This was adopted in *Waugh v. Cope* (6 M. & W. 824); and afterwards in *Wainman v. Kynman* (1 Exch. 118.) If this is correct, where the payment is made by the party himself it cannot be said that payment by the assignees of an insolvent is an admission of, and a promise to pay, the remaining debt. There was no part payment to take the case out of the statute as against his co-contractors, even if it would do so as against himself.

ALDERSON, B.—The payment here was no acknowledgment of liability by the insolvent. The assignee pays such persons as, in his judgment, are creditors.

POLLOCK, C. B., and PLATT, B., concurred.

Rule refused.

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INSOLVENT COURT.

*November 10, 1851.**Re FRANCIS ARMSTRONG.*

Comittal by County Court for nonpayment of debt—Refusal of leave to file petition under 1 & 2 Vict. c. 110.

A. being committed by a County Court for forty days for nonpayment of a debt, he being of ability to pay:
Semblé, that the creditor cannot file a petition under the 1 & 2 Vict. c. 110, s. 36, and obtain an order for the vesting and distribution of the debtor's effects, according to the provisions of the act, inasmuch as he is in custody under a commitment against which subsequent legislation has rendered it impossible for the court to discharge the debtor, and there is no principle of reciprocity in vesting the debtor's property for the benefit of his creditors, when he himself can receive no benefit from the proceedings.

COOK moved for leave to file a creditor's petition and schedule under the 1 & 2 Vict. c. 110, s. 36, under the following circumstances:—The debtor, Francis Armstrong, an innkeeper, was in custody under a warrant of commitment for forty days, by the judge of the County Court of Northumberland, holden at Haltwhistle, after examination in the cause *Harding and Carrick* (plaintiffs) v. *Armstrong* (defendant.) The warrant was produced, and recited that on the 16th June, 1851, the plaintiff obtained judgment against the defendant for 30*l.* 5*s.* debt, and 4*l.* 10*s.* costs, making together, 34*l.* 15*s.* 10*d.* An order was made for the payment of this sum, and the defendant not paying the said sum, pursuant to the order, a summons was taken out, requiring his appearance in court on the 27th of September, 1851; and it appearing to the court that the said Francis Armstrong had sufficient means and ability to pay the said debt, and that he had refused and neglected to pay the same, and that he had not made answer to the satisfaction of the judge upon examination, it was ordered that the defendant be committed for the term of forty days to the house of correction, at Hexham. The certificate from the gaoler certified that on the 29th of September, 1851, defendant was committed to his custody by virtue of a warrant from the County Court, dated November 1, 1851. The creditor, thinking it a quicker and surer mode of obtaining payment of his debt than by repeated commitments in the County Court, prepared a creditor's petition, under the 1 & 2 Vict. c. 110, s. 36, and transmitted it to London to file, but upon inspecting the cer-

tificate of the gaoler, and the warrant of commitment, the chief clerk declined to receive the petition, upon the ground that the insolvent was in custody upon a process from which the court could not discharge him. He was now instructed to apply to the court for leave to file the petition. The 35th section of 1 & 2 Vict. c. 110, enacted, that "any person may apply to the court who is in custody in any prison in England, upon any process whatever, for any debt, damages, costs, sum or sums of money, or for a contempt in nonpayment of money or costs." By the following section (sect. 36), "if any such prisoner be committed for any contempt as aforesaid, shall not, within twenty-one days, make satisfaction to the creditor or creditors at whose suit such prisoner shall have been so committed, or charged in execution for such debt, damages, costs, sum or sums of money, &c., then and in any of the said cases it shall be lawful for any such creditor or creditors, &c., to apply by petition in a summary way to the said Court for the Relief of Insolvent Debtors for an order vesting the real and personal estate and effects of such prisoner in the provisional assignee for the time being, of the estates and effects of the insolvent debtors in England according to the provisions of this act," &c. The prisoner was therefore now in custody for contempt for nonpayment of a sum of money within the express words of sect. 36, and as he had not paid for twenty-one days, the creditor was authorized to petition. Undoubtedly it might be said that the court could not discharge him if he petitioned; yet, as this proceeding was for the benefit of creditors, there was no reason why he should not, for although the man should be discharged before he came up, yet the vesting order would enure to the benefit of creditors, which was the object of the clause, and therefore to be construed liberally in favour of creditors. This was the first occasion of such an application being made, and they were perfectly competent to deal with it.

Mr. COMMISSIONER LAW.—You have forgotten one point which might be an argument in your favour, and I may mention it without giving a general opinion. We used to allow parties to petition that were prisoners upon their own petition, although it was quite certain that the detainer then standing would expire before they could be heard. I allude to men who were in custody under warrants of commitment from the Courts of Requests. The prisoner so in custody would be discharged before the circuit came round, but he used to have fresh detainers by that time, or the proceeding would fall to the ground. In that case, suppose we found him in custody, we could relieve him; in this case we cannot.

Cooke.—This clause is for the benefit of creditors, and should be construed liberally.

Mr. COMMISSIONER LAW.—Not for the benefit of creditors only. We are to make the vesting order, to require the man to file his schedule, and proceed to deal with him. My present impression is against you. The grand principle of the act is benefit to all creditors, and benefit to all debtors. The reasonable principle is,

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that we ought not to deal with any case where the benefit is to be all one way. But what you say about contempt, he is not a person charged in execution. Your petition states "that he is desirous that such prisoner should be ordered to file a schedule of his property according to the provisions of this act, and should thereupon be brought up before the said court to be dealt with according to the provisions of this act, and such petition and the evidence in support thereof shall forthwith be filed in the said court, and the said court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up to be dealt with according to this act, and all things to be done thereupon or preparatory thereto as in other cases according to this act." You are praying for a thing which you know we cannot do.

November 11.

Mr. COMMISSIONER LAW again intimated, upon further consideration, he thought that subsequent legislation under the County Court Act had made it impossible for them to entertain such a petition.

COURT OF QUEEN'S BENCH.

November 14, 1851.

GRANGE v. TRICKETT.

Discharge of insolvent by detaining creditor—Sect. 44.

The discharge out of custody of an insolvent petitioner, by his detaining creditor, under stat. 1 & 2 Vict. c. 110, before any adjudication, has the effect of divesting his estate from the provisional assignee and re-vesting it in the insolvent.

THIS was an action upon a promissory note made by the defendant, payable to one Johnson, and by Johnson endorsed to the plaintiff. Plea—that before the indorsement Johnson being detained in prison under an execution upon a judgment, recovered against him, petitioned the Court for the Relief of Insolvent Debtors, under stat. 1 & 2 Vict. c. 110, s. 35, that thereupon a vesting order was made by that Court, by force of which all the estate and effects of Johnson vested in the provisional assignee. Replication—That after the making of the said vesting order, and before any adjudication under the statute, and before the indorsement to the plaintiff, Johnson was discharged from custody by the consent of the detaining creditor. Demurrer and joinder.

Crompton for the defendant. *Milward* for the plaintiff.

The point in dispute was, whether the discharge of Johnson from custody by the consent of his detaining creditor, had the effect of superseding the vesting order in the Insolvent Debtors' Court, or whether that order still remained in force in such a manner as that the assignee was entitled to distribute Johnson's estate under it among his creditors.

Stat. 1 & 2 Vict. c. 110, ss. 35, 40, 44, 61, 69, 72, 92, were referred to. *Drury v. Hounsfieid* (11 A. & E. 101)(a) was relied on by both sides.

LORD CAMPBELL, C. J.—I am of opinion that the plaintiff is entitled to our judgment. It is true that Johnson's estate and effects under s. 37 of that statute fully vested in the provisional assignee, and that there is no express enactment that under circumstances like the present the property shall revest in the petitioner. But the meaning of the Legislature may be gathered from s. 44. That section provides "that in case any prisoner as to whose estate and effects any such vesting order shall have been made, shall, by the consent or default of his detaining creditor or creditors, be discharged out of custody without any adjudication being made in that behalf by the said court, all the acts done *before* such discharge by the said provisional assignee shall be good and valid, and that in such case, or in case such vesting order as aforesaid shall be avoided by any fiat in bankruptcy thereafter issuing against such prisoner in manner therein provided, no action or suit shall be commenced against such provisional assignee, except to recover any property, estate, money, or effects of such prisoner detained after an order made by the said court for the delivery thereof and demand made thereupon." It seems by this that the effect of this discharge is to revest the property, because it supposes that the petitioner may get out of the hands of the assignee any of his property that is there, and that he may keep that which is not in the hands of the assignee. Indeed, it is difficult to see how the provisional assignee could go on to distribute the assets without any schedule and after the discharge of the insolvent. I think the replication shows that at the time of the indorsement the property of the note was in Johnson, and that he could make a valid indorsement.

PATTESON, J.—I am of the same opinion. The effect of this discharge is ascertained by sect. 44. That provides, not that the vesting order shall be void, because then the assignee would be liable to an action for everything done under it; but that no action shall be brought against any assignee, except to recover property detained, after an order of the court for its delivery. It seems, therefore, that the court ought to make an order upon the assignee

(a) That case decided that where a creditor, on his petition to the Insolvent Debtors' Court, under 1 & 2 Vict. c. 110, s. 36, has obtained an order under s. 37, vesting the estate of his insolvent debtor in the provisional assignee, such creditor is not bound, on the debtor afterwards tendering the amount of debt and costs, to assent to his discharge from custody, nor will the Superior Court order such discharge as to the creditors acting on affidavit of tender and refusal.

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to deliver up all property to the insolvent. If that which is in the assignee's hands is to be delivered back, that which is in his own hands he may dispose of as he pleases.

COLERIDGE, J.—There are no express words, but the policy of the act, and the 44th with other sections, furnish the strongest inference in favour of the property revesting. Under the 35th section, the insolvent is to offer to give up his property, in order that he may get his discharge, as the main benefit of the act. If, however, he gets discharged by the default or the consent of the creditors, he gets no benefit under the act, and ought not to be required to part with his property. Then sect. 44 protects intermediate transactions, and does not prohibit actions for things done under the vesting order, except as against the assignee. Against him an action is allowed under certain circumstances, that is, if he detain any effects after an order of the court for the delivery of them. The order, according to the statute, is to be made, not to revest the property, but to require the assignee to restore it. All that goes upon the assumption that the property has already re-vested.

WIGHTMAN, J.—After the discharge, under sect. 44, the effect of the vesting order ceases, except to protect the assignee against an action for things done under it.

Judgment for plaintiff.

INSOLVENT COURT, DUBLIN.

November, 1851.

Re CLEMENGER.

Opposition of creditors—Discharge.

Where creditors insert an advertisement in a newspaper, calling a meeting, with a view to get up and organize a general opposition to an insolvent's discharge, although there are good grounds of remand, the court will not be influenced by the opposition of such creditors, and the insolvent will be discharged.

THE insolvent was a clergyman, residing in Clonmel, and he was opposed by *Levy* on the part of several creditors in that town, on the ground of having lived extravagantly, and contracted debts without a probable expectation of payment.

He was supported by *Creighton*.

It appeared that, when the case came on to be heard, the parties

were not ready to proceed, and it was adjourned for a fortnight; the opposing creditors returned to the country, and, in the meantime, put an advertisement in one of the Clonmel newspapers, calling a general meeting of creditors, for the purpose of organizing an effective opposition to him; they also wrote letters to his bishop, containing statements very prejudicial to him. When the case came on to be heard a second time, it appeared that, although he had a considerable income both by his benefice and in right of his wife, he contracted debts with several tradesmen, by getting cash and goods on bills. He then sold off the greater portion of his personal property, came to Dublin, was arrested, and petitioned the Insolvent Court. It appeared that the complaints written to the bishop were without foundation; and

Creighton contended that the creditors, by their own misconduct in thus taking the law into their own hands, were disentitled to be heard in opposition to the insolvent's discharge by that court. A similar rule had been formerly made, where a printed circular had been sent round to creditors to get up an opposition; but the present case was far stronger, inasmuch as there was a public advertisement for the same purpose; and then the letter to the bishop aggravated the case.

Levy contended that the example set by the insolvent, considering his station and profession, was most pernicious; he had an ample income, with which he ought to be satisfied, without taking the property of struggling country shopkeepers, which would never be paid for. The misconduct of some creditors ought not to prevent the court doing justice to the general body by remanding the insolvent.

The COMMISSIONER said, he fully concurred in what was stated by the opposing counsel, as to the necessity of a clergyman living within his income and setting a good example; and were it not for the conduct of the creditors themselves, he would undoubtedly remand him; but where he found creditors, as it were, taking the law into their own hands, advertising for a general opposition, and writing unsustained statements to the insolvent's bishop, he could not listen to them in that court. He would discharge the insolvent, and the case would be a warning to other creditors.

Discharged.

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INSOLVENT COURT.

December 23, 1851.

(Before Mr. COMMISSIONER LAW.)

Re HENRY COLLINS MANDER.

Vesting order—Discharge from custody without adjudication.

The discharge of an insolvent from custody by his detaining creditor, without adjudication, while it withdraws his person from the jurisdiction of the court, does not divest the property passing under the vesting order, nor operate to annul the vesting order, or interfere with its past effects, but for these purposes it is necessary that the petition should be dismissed by the court.

THIS insolvent was committed to the gaol of Appleby for debt, at the suit of Joseph Salkeld, of Penrith, and on the 12th of February following, an order, vesting the estate and effects of the insolvent, was made upon a petition filed by the creditor, under the 1 & 2 Vict. c. 110, s. 37. Mr. Salkeld was subsequently appointed assignee, and subsequently consented to the discharge of the insolvent, on the 18th of November last.

Sargood, with the consent of the detaining creditor, Mr. Salkeld, and all the other creditors, now applied for the annulling of the vesting order, and that the sum of 956*l.* 15*s.* in court, might be paid to Mr. Salkeld, in pursuance of an arrangement entered into by the insolvent with him on behalf of the creditors.

Mr. COMMISSIONER LAW.—This is an application for the court to annul a vesting order; and the peculiar circumstances are such that it is clearly just and beneficial for all parties that it should be annulled. But there is a recent decision of the Court of Queen's Bench (*Grange v. Trickett, ante*, 264), according to which the vesting order in this case is already annulled, without the interference of this court. The decision is, that the debtor, by the act of going out of custody, annuls the vesting order, and avoids the title of the assignee. If such is the law, this court will never again be wanted to annul a vesting order on a creditor's petition, and rarely on a debtor's petition; for they will have become null already, and nothing will remain to be avoided by an act of this court. It is a question of the deepest importance, not only because this new doctrine goes to destroy titles which have long been deemed safe, under purchases from an assignee, made after an insolvent's discharge by his detaining

creditor; but because practically such a law can in no case be productive of good, and will necessarily be a standing incentive to fraud. If the vesting order in this case is already void, I will not make the nugatory decree for annulling a thing which does not exist. I will consider the subject, and state my opinion the first day after the adjournment.

JUDGMENT.—*January 2, 1852.*

Mr. COMMISSIONER LAW.—The application to the court in this matter is for the annulling of a vesting order, which was made on the petition of a creditor who lately had the insolvent in custody for 1,500*l.* It appears that the insolvent has had, in right of his wife, valuable interests under two wills, the trusts of which are not quite wound up at the present moment. A large instalment has been paid into court by the executors, and another instalment is ready. Mr. Mander is himself desirous not to proceed to adjudication; and, after some difficulties in settling amounts by reason of the wife's equity, all parties have come to an arrangement, by which the creditors will receive a very large portion, though not the whole of their debts, and on this they have agreed to release the residue. On the faith of this, the detaining and petitioning creditor has discharged the insolvent from custody; deeds have been executed, which will be valid on the annulling of the vesting order, and all parties interested wish this course to be adopted. But a question arises, whether the mere act of a debtor leaving the prison has not already annulled the order; and this must be considered, for I should not willingly pronounce a nugatory decree, pretending to make void a thing which has no existence. If such be the law, that the debtor's quitting the prison has alone operated the retransfer of title, this court will never again be wanted to annul a vesting order founded on a creditor's petition, and rarely one founded on a debtor's petition. It is a grave subject, and has received my best consideration. Ever since a system of law was established for the relief of insolvent debtors, the condition on which the debtor has been permitted to seek the benefits of that law has been the surrender of all property and title to property in favour of his creditors, and this title has been safe and indefeasable until the court should order otherwise. There have been two ways by which property could return to the debtor: one, by the court dismissing his petition; the other when, after payment of his debts, all remaining property is ordered to go back to him. Never, till November, 1851, was it heard of that the single fact of a debtor going out of prison before adjudication should have the effect of avoiding the title of the creditors and restoring it to him. As this doctrine, whether in law it be right or wrong, is wholly unnecessary for any good purpose, and in its consequences purely mischievous, the importance of scrutinising it cannot be overrated. It is founded upon the earlier portion of the 44th section of the present Insolvent Act, introduced by Lord Cottenham in 1838,

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1 & 2 Vict. c. 110. The decision in which the doctrine is brought forward was made by the Court of Queen's Bench in the case of *Grange v. Trickett* (*ante* 264.) The considerations which produced the decision are reported thus:—"That there is no enactment for property to vest; but that, from the proviso in sect. 44, *it seems* that it is to vest, because that section supposes that the petitioner may get back any remaining property, and keep any which he has not handed over." Again,—"That there is no enactment for avoiding the vesting order, because then the assignee would be liable to an action for everything done under it. But it is provided, that no action shall be brought except for property detained after the order of the court to restore it. *It seems*, therefore, that the court ought to make such order." Again,—"That there are no express words; but that the policy of the act and the proviso in question furnish the strongest *inference* in favour of the property vesting." This is all the argument which is offered to our attention in the report; and I believe it is all that could be offered. The words used by the learned judges place the question upon a very intelligible outline. They pronounce that there is no enactment of the law which they desire to lay down; but they infer, from the terms of the proviso in the earlier part of the 44th section, that the Legislature intended such a law; inasmuch as those terms seem to suppose it, and furnish inference in favour of it. With all deference to higher authorities, I will maintain that it is apparent from the statute itself, that the Legislature intended that, on the debtor going out of custody, the trust should stand, not be destroyed; and that dividends were contemplated to be made, not to be rendered impossible. It is apparent that the annulling of the assignee's title was to be a matter for the decision of the court, not for the caprice of the debtor or the creditor. It is apparent that, if the supposed law had been intended, it would have been expressed in certain recognised words, and not by the words of the 44th section. It is further demonstrable that the absent enactment which it is desired to supply, would, if it existed, be an unnecessary and absurd incumbrance to the statute for any rational purpose, though actively conducing to a bad purpose. These are all reasons which touch the probability that the Legislature of 1838 could intend the law lately laid down. I shall further vindicate my own hesitation to accept it, if I can point out an inconsistency in the judgments of that court in which this law was advocated with success. 1. The important clause for the subject before us is the 37th. It points out the property which is to pass by the vesting order; and this is not only present property, but, to a certain extent, future property. And there is a distinction as to the future property, which specially claims attention. The future property, which, by the order, is vested in trust for creditors, is different in two different contingencies—the contingency of the insolvent proceeding to adjudication, and the contingency of his being discharged from custody without proceeding to adjudication. So long as he is

proceeding to adjudication, the order operates to vest, in trust for creditors, everything which shall accrue to him up to the time when he shall be entitled to his final discharge according to the adjudication. If he shall be discharged from custody without adjudication, it operates to vest everything which shall accrue up to the time when he is so discharged. Such definition would be vain, if the Legislature had intended this incident of a discharge to annihilate all ownership of property, instead of only terminating the right to acquire more. They have expressed the latter, and, therefore, did not intend the former. In the earlier Insolvent Acts, the instrument which gave title to the provisional assignee, vested in him no future property whatever. This was first effected by the act of 1826, and with the same words which we find in the present act. Those words are not ambiguous, and cannot be expunged. They show expressly the future property, which the court shall order to be vested in case of discharge without adjudication. If you study the clause with the plain grammar of it, you find the words to be these:—"That in case such prisoner shall obtain his full discharge from custody without any adjudication being made by the said court, then all the future estate, right, title, interest, and trust of such prisoner in or to any real or personal estate and effects within this realm or abroad, which such prisoner may purchase, or which may revert, descend, be devised, or bequeathed, or come to him before he shall be so fully discharged from custody, shall be vested in the provisional assignee," &c. Plainer words could not be used to define property which, in a particular event, being the event which claims our attention, shall vest in the assignee. Accordingly, one who contends that, by virtue of that very same event, the assignee becomes denuded of all property whatever, must, at least, admit that these words are inconsistent with that portion of the statute on which he intends to rely, and must be prepared, as I am, to sustain some words of the act at the expense of others. Let me, then, here make this further observation on the passage which I have just quoted. The difference of opinion concerns the effect of a discharge without adjudication. As we read that passage, we are prepared to learn what that effect shall be; for we arrive at the incident itself, in coming upon the words "in case he shall obtain his full discharge from custody without adjudication." What, then, do we learn in the words which immediately follow? Do we learn that property shall be divested? No. We learn the contrary; we learn that property shall be vested. This 37th clause, then, furnishes the strong groundwork of these few propositions, from which I am not yet induced to swerve. The person of an insolvent debtor can be withdrawn from the jurisdiction of the court, but not his property, without an act of the court itself. The withdrawal of his person puts at once a stop to the operation of the vesting order on accruing property. So it prevents those further powers over future property, which the court obtains through a control of the person, in exacting the warrant

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of attorney before a discharge is pronounced; and afterwards in authorizing execution of the judgment, or otherwise compelling the surrender of funds through its power of commitment. But the withdrawal of the person does not vacate the title to property already acquired and in hand. Proceeding with the same 37th clause, we further observe the consistent intention of the Legislature. We have seen the incident of discharge without adjudication exhibited as an incident that affects the operation of the vesting order; not annulling it, but preventing its further action upon new property. In the next sentence, we find the provision for annulling it; and this provision, as regards a debtor's petition, is the same as it has been ever since the present court was constituted. It places the important act of avoiding the assignee's instrument of title in the judicial discretion of the court. Is it possible, I would ask, that the Legislature could, after fully providing for the deliberate and discretionary avoidance of the vesting order, in section 37, have desired or intended to tolerate the other accidental means of avoidance, which is now contended for, and yet fail to assert it? It will hardly be urged that the proviso in the beginning of the 44th section is more efficacious without an enactment to hang it upon, than it would be with one. Let us then conceive such an enactment, namely, that the discharge of an insolvent without adjudication shall operate as an annulling of the vesting order. Will the whole law of avoidance have a probable or an improbable aspect? Suppose the whole to appear in a bill for Parliament; and that the question arises on the likelihood of the Legislature accepting it. The clauses would stand thus. The first would be, "It is competent to the court, by dismissing the petition, to annul the vesting order; and then prior acts of an assignee shall be valid, and no action shall be brought, except," &c. The other would be, "If the insolvent shall go out of prison this shall annul the vesting order; and then prior acts of an assignee shall be valid, and no action shall be brought," &c. Surely any reasonable man, and, therefore, the Legislature, would reject the latter matter as unnecessary and absurd. He would say, "The annulling of the vesting order is a thing which is always applied for upon the withdrawing of the detainer. If the discharge itself is to annul it, it is unnecessary to give the court power to annul it. Nay, it is absurd; for when it has been annulled by the act of going out of prison, nothing remains to be annulled by the court. You are pretending to give the court a discretion to act, and at the same time providing that the thing shall effect itself before their discretion can be appealed to." I maintain, that the Legislature could never intend to have two such enactments concurrent with one another; and, as the question is, which shall we believe in, I say let us believe in the law which they have enacted, not in that which they have not enacted. Let us believe that they were in earnest, when they made the annulling of the vesting order to depend on the decision of the court. Let us believe that,

as this had been the settled law before, they did not, in re-enacting it, intend to repeal it. The words of the statute which I have just been considering, furnish us with a further argument against the Legislature having intended such a law as that of which I am speaking. If it had been intended, it would have been effected, not by such means as have been thought to indicate the purpose, but with words which the act itself has marked out as the fittest for effecting that purpose. We have, in those words of the 37th section, a complete fulfilment of the two purposes of annulling the trust and protecting the trustee. If these purposes were to be declared on the occurrence of another simple incident, the same clear words would have been used to declare them; or both incidents might have been stated together, and the very same enactment would to a letter have been applicable to both. I cannot imagine an opponent to deny the superior probability of this; but I will suppose him to say "Why should not the Legislature state logically and clearly the consequence of one thing, dismission of petition; and yet dubiously and obscurely hint at the same consequence as flowing from another thing, the prisoner's discharge?" I would answer, because it is inconsistent; and consistency is a test of intention, as it is a test of truth. It is among the ordinary rules of construction that a man is taken to employ the same words to represent the same ideas. The Legislature will use the same words to establish the same regulation. What they accomplish in one instance by a positive declaration that a solemn written instrument shall be null and void to all intents and purposes, they will not intend to accomplish in another by words that embrace none of those ideas, and which speak nothing affirmative of one sort or another. What then, I may perhaps be asked, does the 44th section mean? I am entitled to decline the attempt to make a meaning for it; for my case is, that it contains no available sense. I can but conjecture how an author may have come to handle that section and leave it as it now appears. That section is a mutilation of the 18th section of the prior act. The 18th section of 7 Geo. 4, c. 57, provided for the safety of an assignee in the two cases where it was needed; of the court avoiding his title; and of bankruptcy operating the avoidance of it. For the first, the provision is now carried, as we have seen, into the 37th section. For the latter, it is still wanted, inasmuch as the regulation of title, where there is the competition of bankruptcy, has necessarily occupied distinct clauses. Knowing, as we all do, why the task of passing an Insolvent Bill in 1838 was undertaken, I must here advert to it. I have good reason to say that the bill (I mean that portion which contains the law of insolvency, from section 23 to the end) was in print on the second day after the first instruction was given for preparing it. It was, therefore, although a creditable production, open to imperfections. The task was, to engrave one new subject, a creditor's petition, on the existing law, and to substitute, throughout the act, vesting order for deed of assignment; because that new process was applicable to the peti-

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tion coming from either party. In fulfilling this task, the prior act was to be touched, clause by clause. The avoidance of title on dismissal of petition could no longer be a proviso in the deed of assignment, as it used to be: for this was done away with. It was well brought into the place where it now stands the 37th section: and the safety clause was well transferred into the same place. If any should be surprised that there is not in the same place a proviso for assignees' safety, when vesting order is annulled that was made on creditor's petition, this may be accounted for. I well remember that the bill was introduced without giving in that case any annulling power at all. A vesting order made on creditor's petition was to be immortal. At some later period a discretionary power was inserted, possibly by a different hand, for the court to annul, provided there was the petitioning creditor's consent: and no safety clause accompanied it. Accordingly, in this case, when an insolvent seeks to annul the vesting order, he enters into a rule of court not to sue, &c. as he used to do in all cases before a safety clause was first invented. We see, but I have no means to know how it happened, that as the old 18th section of 7 Geo. 4, c. 57, came to be handled in its turn, it was shaped at last into the 44th section of the present act. The former used throughout to be very good sense. As to its first object, there had been an annulling enactment, whose consequences were to be qualified. It made an exception, where there was something to except from. The present clause, in its first sentence, is without sense, because there has been no such enactment, and nothing to exempt from. I cannot tell what confusion of ideas might attend those who were touching at intervals a new subject which they had to engrave on to an old one. But I can see that the notion of a discharge, *ipso facto* annulling the order, is one that should be rejected in reference to the new subject, creditor's petition, as well as in reference to the old subject, debtor's petition. The provision for annulling a vesting order made on a creditor's petition, which stands at the end of the 37th section, enables the court to do it, "if it shall seem just and right, but not without proof made to the satisfaction of the court of the consent of the petitioning creditor." Whatever may be the wisdom of this limitation of the discretion of the court, it appears as the only limitation. It is quite plain, that, subject to this, that important act of annulling title in one party, and re-establishing it in another, is to be the act of the court, according to the view which it may take of what is "just and right." In every case where we have annulled such a vesting order, the consent of the petitioning creditor has at least been vouched by the discharge of the debtor. But, if the thing which we have meant to do under the act as "just and right," had in each case already done itself without reference to right or wrong, we have but made a series of empty decrees, which might better have been abstained from. Although not further pretending to explain how a few words in a long act of Parliament, namely, the first sentence in sect 44, came to be void of effective meaning, for

want of any supporting context, I cannot affect to be surprised at the casualty. Whatever hand sketched it, the speculation in which it was done was a mistake at the moment, and soon passed away. A man may sometimes forget what he has just written down; and there is indubitable evidence that this could happen in respect of that sentence; for a plaintiff's default is introduced as an operating cause of discharge from custody; although it has just been provided (sect. 41), that that cause should never produce that effect. There is still another clue to the intention of the Legislature, in a subject plainly connected with that which I first mentioned. The act, which in the vesting of future property by the order, made distinction between the case of him who waits for adjudication, and him who does not, again makes distinction between their cases, when it comes to provide for the application of property to the payment of debts. In the former case there is a sworn schedule; and a debt which is there admitted is to be deemed correct unless reason appear for further inquiry. In the other case, where no adjudication, there is no sworn schedule, and each debt is required to be proved. Now, as the Legislature contemplated dividends to be made where there is no adjudication, it must have contemplated them to be made where the debtor has been previously discharged from custody; accordingly, it could not be intended that on such discharge all the funds should vanish of which dividend could be made. A scruple might here be suggested, that the provisions of the 62nd section for ascertaining the debts are expressed to be for the case of "dividend made before adjudication," not of "dividend made without adjudication." It is true that there is that difference of expression here, and in the 37th section. That section defines the property which is to vest where there is "discharge without adjudication;" and this 62nd section provides for a "dividend made before adjudication." But the two expressions admit of the same meaning, as in ordinary language you may say, "A. B. died before he had attained his majority," or "he had died without having attained his majority." Moreover, there are plain reasons, showing that the expression in the later section does mean the same as the expression in the former one:—1. As sect. 37 provides for the existence of property in the case of a premature exit from custody, it was necessary to provide for its distribution; and this is done in the 62nd section, and nowhere else. 2. It is almost for that case alone that the provisions in question are requisite. And now I call attention to this, that the new doctrine will restore title where title ought not to be restored. It will hardly be denied, that in constructing a system of bankruptcy or insolvency, where the first step must be the placing of all property in trust for creditors, it would be a very strange provision that should give the debtor the option, at any moment during the working of the process, to declare it void, and to resume all to himself. Such, however, is substantially the effect of the decision pronounced in the case of *Grange v. Trickett*. Discharge without adjudication, commonly occurs by the will of the insolvent himself. In a large number of cases the detainer is

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that of a friend: and the debtor may be said always to carry his discharge in his pocket. The very insolvency on which *Grange v. Trickett* arose is the ordinary instance. Johnson, the insolvent, appeared for hearing before the County Court; and, his case being adjourned to a future sitting, that he might satisfy the judge on some point, he elected to go out of custody before the day arrived. There is in the schedule the usual *indictum*: the debt of the detaining creditor appears to be for cash lent without security. The thirty-six other debts are for various considerations, not borrowed money. But when the detainer is hostile, the man of unfair intentions will often exercise a similar option by negotiating for his liberty, if, on experiment, he finds this will suit his purpose: and anything that aids him in this, defeats the policy of the system; which is, that the property should be devoted not to one, but to all the creditors. It is quite true that there are cases in which a detaining creditor discharges the petitioner before the day of hearing, moved by ill-nature only, and sacrificing his own claim to the object of disappointing the other from the general benefit of his petition. Any interruption of custody before adjudication, unless it be on recognizance of sureties, has this effect: and to cause this effect adversely is most unjust. It is discreditable to the Legislature that this evil has not been remedied. My efforts have not been wanting to remedy it. When the 1 & 2 Vict. c. 110, was in progress in 1838, I wrote strongly to the Lord Chancellor upon it from my circuit, illustrating the necessity with instances present before me: but these representations were not heeded. In my dissentient report, as a member of the commission of inquiry, presented to Parliament in 1841, this evil and its proper remedies will be seen noticed in page 47. In that same session, the cure which I proposed was adopted into the insolvent law of Ireland. (a) The evil has not yet been thought worth curing in England. This particular hardship, however, offensive as it is, is no adequate provocation to the doctrine now under consideration. It is itself an error wanting correction, and cannot vindicate the impolicy of giving the debtor the power of withdrawing his property from the jurisdiction of the court. This privilege affords no encouragement to do right, but a temptation to do wrong. It is the privilege of determining, without control, a trust created by the law for those towards whom he must, *prima facie*, be regarded as a wrong doer. It is to be remembered, that the vesting order necessarily suspends the individual activity of those who are seeking their rights by action. The law tells them that it is useless to travel on to execution against property. The trustee for all takes possession of property disclosed, and is clothed with title to any which may not be disclosed. The contrivances open to the debtor are ample. It is easy for him to ensure an adjournment of the hearing, if he should wish time to shape his course according to the weight that may bear against him. If powerful opposition is ready he can decline to appear, and wait the chance of a time

less convenient to his opposers. When the hearing comes, nothing can force him to an adjudication. Proof may be given, which shows him to have dealt fraudulently with his property, or to have withheld a fair disclosure of it. He feels his demerits to be known; and, as his experiment is failing of its intended success, he can decline to be sworn to his schedule. He can put off his custody by the same friendly aid with which he put it on; and so far set the court and creditors at defiance. By the late decision, whatever portion of his property has been reached by the law, the law must hand back to him. He designed to defeat the law by withholding the half of his property. The law rewards the fraud, by re-investing him with the other half. Justice hereafter may or may not overtake one who so offends. If she does, the loss to the injured parties will still have been aggravated, and this court will have been the unwilling instrument of mischief. I speak advisedly, when I say that the proposed law tends to make the useful machinery of this court the instrument of fraud. A petition, followed by a vesting order, saves furniture and stock from the expected grasp of the sheriff. This should avail in favour of the body of creditors, not against them. The new doctrine will easily make it a trick to cheat one and all. The provisional assignee sells in his usual course of duty; the money comes into court; the insolvent goes out of prison, and claims it as his own. If the detainer is not friendly, this law still tends to undermine a trust created for the body of creditors. A detaining creditor has always had advantage over others in his power of separate negotiation. This is necessarily the case before hearing; and also after an unfavourable judgment. Other creditors, too, are often ignorant of their power to detain on mesne process in pursuance of the adjudication. Those advantages of the one will be vastly increased. The debtor, who has ascertained the convenience of parting with so much as will pay that one, and thus purchasing his escape from the jurisdiction of the court, will know that the law has been strained to sanction the preference; for that it enables him in a moment to make all property his own again, and so qualifies him to pay that purchase-money out of it. The change will be pernicious to all. It is not for the debtor's best interests that he should be under the constant temptation of present convenience. If the apparent amount is more than will pay the detaining creditor in full, but not such as will leave surplus after paying 10s. to all, there will always be the temptation to give himself the quicker discharge, and repossess himself of the funds. It is curious, that in the thirteen years during which the act of 1 & 2 Vict. has been in operation, the point lately decided has never been contended for, though every day has furnished opportunity for the experiment. It has never been imagined by those who have practised here, that an insolvent could ask for the restoration of property, unless the court should do an act to re-establish his title to it. He, who either by choice or necessity has steered away from adjudication, has wished to repossess himself of what he had given up;

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but none was ever advised to ask only for a "delivery order." The application to restore title is through a dismissal of the petition, and this is granted or refused according to the circumstances. It is right to notice that, although the interpretation of law which I am resisting is quite new, the view of policy to which it is subservient is not new. This view, which I have always deemed erroneous, was adopted by a late commissioner of this court, a man much respected, and of good legal reputation. He was ready, in these cases of discharge, blindly to restore the property by dismissing the petition as a matter of course. He used to say that "there was no use in sustaining the title when there was no schedule, and no means of examining the insolvent for getting at his property." It is true that a difficulty is offered to the execution of the trust when no schedule is furnished, and the personal examination of the debtor is prevented. So also if a schedule is false, and the insolvent refuses to answer questions put for ascertaining his property, incidents which no English law can prevent, it is difficult to see the way to funds for making dividend. But this is no good reason against adhering to a legal right; and, while such observations give little consolation to the claimants for letting title go back to a contumacious debtor, there is a practical answer to them in the useful dividends which have been arrived at under the most disadvantageous circumstances. If the want of schedule, and the consequent want of knowledge, should make us give a man his property back when he is out of prison, it would be a reason for doing so when he remains obstinate in prison. We are equally without help from him to make the list of claimants on his property; but they are to be ascertained through public invitations to proof. I have known this to be done; so that, after an obstinacy of many years, the dividend itself, amounting to payment in full, has led to the prisoner's discharge. He has then desired to terminate the divesting of his property: has supplied reluctantly a list of creditors on oath, showing some small amount which had not appeared before; and, on payment of these, has got back his title from the provisional assignee. Title may be worth having, even when there is no discernible object on which to fix it. I have known, after the death of an insolvent, where there had been no hint or suspicion of property, that the debts were paid in full, by means of a reversionary interest existing in trustees, to whom none but an assignee of this court could give discharge. As I said, opinions have varied on the policy of restoring title as a matter of course to one discharged without adjudication. Some years ago, my attention was drawn to the easy way in which vesting orders, especially those made on creditor's petition, were annulled under that circumstance, almost with as little concern or inquiry as the debtor will have in annulling it himself. As for instance, a creditor got a vesting order, and was assignee. The debtor resorted to the Bankrupt Court, where the protection law was then administered, and got an immediate discharge. After a time, they joined in applying to annul the order,

the assignee notifying that his own debt was paid. It was done, and no questions asked. Another man went out through the Bankrupt Court, more than a year after the vesting order; and afterwards got it annulled on *ex parte* application, showing a composition with the petitioning and detaining creditors, but without notice to the rest. In another case, where the insolvent got himself discharged by a judge's order, on payment of the debt for which he was detained, the vesting order was annulled on that sole ground, and the money in court given back to him, although he had more property and more creditors, and although the proceeding was assented to by none, and strongly opposed by some. In consequence of this easy practice, the four commissioners were present together on the 22nd of May, 1845, in the case of a Welch clergyman, against whom a plaintiff, having him in execution for 125*l.*, had obtained a vesting order. The same party got himself appointed assignee, and was taking steps for selling the landed estate, which was of considerable value beyond the mortgages upon it. The insolvent paid this debt, went out of custody, and applied to the court to annul the vesting order. There were other parties apparent as creditors, one claiming a very large sum, and others lesser sums. These insisted on our sustaining title in the assignee. My principle prevailed—that the trust which was created equally for the payment of all, ought not to be annihilated because of the payment of one. While on this principle I held to the vesting order, I saw at the same time, that no man was to be more benefited by that course than the insolvent himself. The assignee was not left to his own inventions. An order was made restraining the sale of the property. The debts were promptly inquired into. The claimant of 1,600*l.* failed in evidence, and proved nothing; and, when the total was ascertained at 1,010*l.* 14*s.*, and assignee's costs taxed at 26*l.*, the insolvent was too glad to provide the amount, and pay it into court for division. A revesting order was then made, clearing him in a far more comfortable way than if we had turned him adrift to an unequal conflict with the Welch lawyers, and withdrawn the shield of protection which, on creation of the trust, the law required us to hold over the interests of both parties. In this instance there were counsel interested for the client, and a commissioner, moved by his views of policy, desiring to annul the vesting order. I may, therefore, fairly observe, that if any of them had set a value on the 44th section, as affecting the title of the assignee, it would not have been overlooked. The contention would have been, not whether the court should annul the vesting order: it would have been this:—"The vesting order has become void by the discharge; none exists for the court to annul. Title went back to Mr. Evans as he walked out of Beaumaris gaol; he wants none at your hands." From the day the act passed to this hour, no one in this court ever pronounced that doctrine. If it should be thought that I set too high a value on the sustaining of title, I must confess that I see no safety to honest men, nothing on which they can dare to resist fraud, unless the law shall sustain it

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till it is, by authority and with notice, taken from them. The want of notice, which there must be under the peremptory operation of the avoidance as now laid down, is a most offensive ingredient. Suppose a case specially calling for the appointment of an assignee in an early stage, and specially requiring from him prompt and active measures. Suppose this trustee courageous and honest, having no trust funds to start with, to be embarked in measures of importance, tending to the relief of the creditors. Can we believe, without better evidence than is offered, that the Legislature intended his office of trustee to be liable to cease in an instant, without any chance afforded him to lift his voice against it, and even without notice given when the thing has taken place? Take this simple instance—an obstinate man, having abundant resources, persists in refusing the fair disclosure of his dealings, not caring for the loss of liberty, nor even for the Secretary of State's prison regulations. The assignee finds himself driven to a suit against those in whom a legal title has been fraudulently placed, and he trusts to the ultimate justice of the law. In a moment the perverse debtor resorts to a compromise with the party by whom he is detained, and who may have done nothing of enterprise beyond that detainer; and by walking out of the Queen's Prison crushes the adversary's title, and laughs at him for the unavailing expense he has incurred. "You thought," he can say, "there was a trust for creditors. It was but a trust for suspending their rights while it suited me to delay them." If he who has given title can thus revoke it with no control resident in the law, where is the justice or the policy? And yet to all these lengths the doctrine of *Grange v. Trickett* must extend. If you admit any exercise of discretion, that case is at an end. It may be excused if I am not insensible also to the confusion which would be introduced into our useful system of official management. An assignee is, by the express words of the statute, an officer of this court: and we ought, at least, to know when he comes into office, and when he goes out of it. The public, too, to whom there is here every facility of inquiry, have a right always to learn, by asking, in whom the estate of an insolvent is vested, whether of one who petitioned last week, or thirty years ago. There has never yet been a difficulty in this office in giving a true, and safe, and prompt answer to such a question. But if the law is to be taken as proposed, the answer in every non-adjudicated case must be, "We cannot tell you: first find out whether the party remains in custody: and then remember that, although A.B. is assignee now, he may to-morrow be dismissed from office by the insolvent." This is a new case. In an old case the obscurity may be great. There is now no obscurity in any case. Title is in the provisional assignee, unless our records show that it has been annulled, or passed to another. Having thus relied upon the words of the act, the distinctly avowed objects of the act, the general policy of the act, and the comparison of probabilities which belong to the two views of the question before us, I will,

in conclusion, call attention to this broad proposition. That it becomes us to think that the Legislature, in constructing this system of law for such it is, intended an arrangement, in which the provisions concerning debtors and creditors should in all parts hold well together, each corresponding with and forwarding the rest; so that, when we seem to find anything manifestly absurd or perverse, it becomes us to lean to the belief that it could not be intended; and so incline to the rejection of it, if an honest dealing with language permits this to be done. The doctrine which I oppose leaves the interest of creditors to the mere sport of chance. These are among its effects: suppose an assignee to complete a sale of property, and a dividend to be made, the insolvent still remains in custody, the creditors will profit by the payment; but suppose the purchase-money to come into court only the day before he leaves the prison: the creditors will get nothing. Such is its precarious influence on the destiny of proceeds. Now mark its influence on the sale itself. If there is real property, there must be a convention of creditors on fourteen days' notice by statutable advertisement, to decide the time and place of auction; and the notice of sale must then not be less than thirty days. The auctioneer is instructed; and the policy of the law seems to require that a sale should be effected. In the case of the obstinate man, who files no schedule or refuses to swear to it, shall the disposal of property await his pleasure? One is inclined to say—No. But if the sale goes forward, who shall undertake for a title? Who shall know whether the insolvent is in prison or out of it when the auctioneer's hammer falls? or whether he will stay there till the contract is performed? No assignee would be so rash as to engage for title, ignorant as he must be, whether the vesting order, which constituted his own, may be dead or alive. He would be ill-advised so to subject himself to an action. And yet, without such assurance of the right to sell, who would be a purchaser? Real property must be sold in six months; and this court has power to enlarge the time: a power usefully exercised every day. To enlarge the time with so precarious a title will hardly be desired. Creditors will prefer any sacrifice to a total loss; and delay, however wise for general reasons, will but increase the probability that they will have no land to sell. To those who will sift the statute throughout further comments will probably arise to expose the perverse effects of the proposition which has been discussed; and to assure us that the Legislature did not intend to construct a system of law affected with such deformities. Lastly, let me say that the impressions which I have thus received as to the intention of the Legislature are not discouraged, when I observe the terms in which a learned judge appears to have given his acquiescence to the recent decision—an acquiescence as appears to me, approaching to dissent. The general tenor of the judgments, is, that *it seems* that property is to revest, and that policy and the proviso furnish *inference* that it reverts. In the judgment of one for whom I have the truest and heartiest respect,

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I seem to read that it does not vest. It is reported thus:—"The 44th section provides, not that the vesting order shall be void, because then the assignee would be liable to an action for everything done under it, but that no action shall be brought," &c. These words do not import that the vesting order was intended to be annulled. They give a reason why it is not to be annulled, namely, that the assignee would be unprotected. That reason may be an insufficient one, and so I think it is. The danger to an assignee could not dissuade the Legislature from annulling the vesting order; for in that instance where it is their unquestionable intention to restore the debtor's property, I mean when petition is dismissed, the act does expressly annul the vesting order, and, nevertheless, does protect the assignee. But if the reason so expressed is insufficient, and the judicial opinion thereby wants its accustomed strength, this is to me encouragement to resist the decision; for what can have led that powerful legal mind to so unsatisfactory a resource, but an unwillingness to rest the important act of annulling title upon the feeble ground of the 44th section? There is the plainest intimation that the Legislature abstained from annulling it, and was satisfied with providing that no action should be brought, except for property detained after the order of the court to restore it. "It seems, therefore," says the learned judge, "that the court ought to make such order." We can indeed make such order, and without regard of the 44th section. We do so constantly; but then we also do the act which annuls title in one and revives it in another. Even if there were words, which there are not, enjoining us to make such order, it would be a lame business to order delivery if we cannot impart title. In a matter of cash or furniture, a man perhaps might say, "An order for delivery made by the Insolvent Court is quite enough, without mentioning title." Truly the committing for non-delivery would be an effective process towards possession. But there are many interests vested every day in assignees, reversionary, contingent, and other, the re-enjoyment of which the Legislature would hardly propose to secure to the recipient by an "order for delivery." And yet an order for delivery is the utmost aid which could be claimed of the court under this proviso; and that only by inference drawn from a prohibitory enactment. I think that much value is not to be placed on an order for delivery without a radical change of title. The late decision cannot be construed to stop short of it. That was a question of title depending on the avoidance of the vesting order. It was nothing else. The insolvent indorsed a bill, which he had omitted to hand over to the provisional assignee; and the decision affirmed the title of the indorsee. This decision propounds an annulling effect, which will challenge many a title to land and other things, that have in the last thirteen years been taken by purchase from assignees after discharge of the debtor without adjudication. This decision has the whole effect or none; and one who doubts the annulling of the vesting order must question the decision altogether. Such, and so fortified, are the arguments

which, in my opinion, justly belong to the ground on which the new law has been rested, the intention of the Legislature. It seems incredible that, in providing for the amount of property which the creditors should have in the event of a man going out of custody without adjudication, the Legislature intended that by that event they should lose their right to property altogether; and equally incredible that they would lay down instructions by which dividend should be made in that event, if they intended that there should never be any estate to divide. I cannot think that, after providing a clear and unequivocal form of words for affirming and enforcing a particular object, they would desert every word of that form, in the chance that the public might understand the same thing through phases which affirm nothing at all. I cannot think that they would in terms assign a grave duty to the justice and wisdom of the court, and yet intend it to be performed at the pleasure of parties interested. Nor can I, only from the loose unsupported words which are found in the beginning of the 44th section, believe that the Legislature could intend a thing not only useless but absurd, and not only absurd but injurious. It has been my duty to criticise a sentence which is a blemish to the work it belongs to. But in so doing I have best shown my respect for an act of the Legislature. So great are the inconsistencies, the perplexities, the public detriment, for which the statute becomes responsible when it is attempted to foster that sentence, that we best uphold the intentions of the Legislature as sound and wise, if we treat that small part as an unmeaning accident. I am sorry to have detained you so long. My apology is in the vast importance of the subject, and still more in the rank and weight of those from whose opinions I dissent. Let the vesting order be annulled. I will frame the requisite instructions.

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COURT OF QUEEN'S BENCH.

*Hilary Term, 1852.***HALL v. DYSON.**

Agreement—Illegal consideration—Opposition to discharge of insolvent. A contract whereby the friend of an insolvent promises to pay a creditor a sum of money in consideration of the creditor's offering no opposition to the discharge of the insolvent is founded on an illegal consideration, and is against the policy of the Insolvent Act, and therefore void.

A SSUMPSIT. The declaration stated that before and at the time, &c., one D. Bryan was indebted to the plaintiff in a large sum of money exceeding 50*l.*, to wit, &c., and was a prisoner for debt in actual custody, and had petitioned the Court for Relief of Insolvent Debtors for his discharge from custody, according to the provisions of the statutes then in force for the relief of insolvent debtors in England, whereupon such proceedings had been duly had in the said court, in the matter of the said petition, that the said petition was duly referred and transmitted to the County Court of Yorkshire for the hearing thereof; and the said application of the said D. Bryan for his discharge from custody as aforesaid was pending as aforesaid, and undetermined before and at the time of the making of the undertaking and promise of the defendant thereafter mentioned: that the plaintiff had before then threatened to oppose, and was then about to oppose the discharge of the said D. Bryan upon such application as aforesaid; and thereupon to wit, &c., in consideration that the plaintiff would withdraw his opposition to the discharge of the said D. Bryan upon such application as aforesaid, the defendant undertook and then promised the plaintiff that he, the defendant, would pay the sum of 50*l.* to the plaintiff through his agent, A. W., on the 31st of May, 1851. That after the making of the said undertaking and promise of the defendant, to wit, on &c., the said application of the said D. Bryan for his discharge from custody as aforesaid was duly heard and determined by the judge of the aforesaid County Court. That the plaintiff, confiding in the said undertaking and promise of the defendant, did, from and after the time of the making of the said undertaking and promise hitherto, altogether cease and withdraw his opposition to the discharge of the said D. Bryan upon such application as aforesaid; and that he, the plaintiff, did not in any manner, at any time after the making of the said undertaking and

promise of the defendant oppose, or attempt to oppose, the said application for such discharge as aforesaid. And that the time for opposing the said discharge elapsed long before the commencement of this suit, to wit, when the said application was heard and determined as aforesaid, of all which premises the defendant afterwards, to wit, on &c., had notice and well knew. Breach, non-payment by the defendant of the said sum of 50*l.*

The defendant pleaded, fourthly, that before and at the time of the making of the said undertaking and promise, as in the declaration mentioned, to wit, on &c., the said D. Bryan was indebted to the plaintiff as in the declaration mentioned, and also to divers other persons, to wit, &c., in divers sums of money amounting in the whole to a large sum of money, to wit, the sum of 1,000*l.* And that the said undertaking and promise in the declaration was made, and his the plaintiff's opposition was withdrawn, as in the declaration mentioned, without the leave or licence, privity or consent, and in fraud of the said creditors of the said D. Bryan, and without the privity or consent of the said judge of the said County Court. The replication traversed the plea, and issue was taken thereon.

At the trial before Maule, J., at the summer assizes, 1851, for the county of Northampton, it appeared that Bryan was a prisoner for debt in York Castle, and that he presented his petition for discharge under the Insolvent Debtors' Act, as alleged in the declaration. The petition was appointed for hearing on the 26th of May, and the plaintiff, as one of the creditors, had given notice of his intention to oppose the discharge of the insolvent at his hearing in the County Court, and appeared to oppose him; that an adjournment took place to a future day, before the arrival of which the plaintiff agreed to withdraw from his opposition upon the defendant's executing the following memorandum:

"In consideration of Matthew Hall (the plaintiff) withdrawing the opposition in the case Matthew Bryan, now a prisoner in York Castle, I, Henry William Dyson (the defendant) hereby undertake to pay Matthew Hall 50*l.*, to be paid on Saturday next.

"H. W. Dyson."

The plaintiff accordingly withdrew his opposition, and Bryan obtained his discharge. The learned judge directed a verdict for the plaintiff, but reserved to the defendant leave to move to enter the verdict for himself. A rule having been obtained accordingly for that purpose, or to arrest the judgment,

Humfrey and Sir E. Wilmot now showed cause.—This case is distinguishable from *Murray v. Reeve* (8 B. & C. 421), which is relied upon by the defendant. There the creditor was to receive a payment out of the insolvent's estate, and the other creditors were thereby damaged: what is said in that case with respect to creditors being deprived of the power of opposing is not applicable to this case, since according to the practice of the courts, any creditor may avail himself of the notice given by another. Here the

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whole estate and supervision of the estate is left as it was, and the plaintiff bargains for the receipt of a sum of money which could never come to the creditors of the insolvent at all. The plaintiff was not bound to oppose the insolvent; the other creditors could not compel him to do so, and there is no offence in his declining to do that which he is not bound to do. His declining further opposition from pecuniary motives does not make it any more illegal: (*Simpson v. Lord Howden*, 9 Cl. & Fin. 61; 10 A. & E. 793.) *Gould v. Williams* (4 Dowl. P. C. 91) cannot be supported; but *Taylor v. Wilson* (5 Ex. 251) is a strong authority for the plaintiff. They referred also to stat. 1 & 2 Vict. c. 110, s. 72, and to *Jones v. Waite* (5 Bing. N. C. 341.)

Miller, Serjt., and *Hayes*, in support of the rule.—This agreement is void, not by any express statutable provision as was contended for in *Taylor v. Wilson*, but as being against the general policy of the acts for the relief of insolvent debtors. The withdrawal of the opposition under these circumstances was a fraud upon the other creditors, and was illegal: (*Nerot v. Wallace*, 3 T. R. 17; *Kaye v. Bolton*, 6 T. R. 134; *Murray v. Reeves*, 8 B. & C. 421.) (They were stopped by the court.)

LORD CAMPBELL, C. J.—This rule must be absolute. The plaintiff may have withdrawn from his opposition without breach of any legal or moral obligation. But it is an illegal thing to contract to withdraw from such opposition for a money price. The case of *Simpson v. Lord Howden* was well decided, for there no other person except Lord Howden was interested or could be concerned in the arrangement between him and the projectors of the railway. That is not so here. The insolvent is opposed by the plaintiff: steps have been taken to render that opposition effectual, and then the plaintiff agrees to be bought off, and upon a promise of a certain sum of money withdraws his opposition. There may be no legal obligation upon him to persist; but there is a moral obligation, because he has led the other creditors to suppose that the case will be fully investigated before the proper tribunal. Justice is disappointed, and a judgment given without investigation. Upon general reasoning, and the express authority of *Gould v. Williams*, the promise now sought to be enforced is founded upon an illegal consideration, and is therefore void. In *Murray v. Reeves*, the only illegality was the agreement to withdraw from opposition, because the money to be paid out of the estate was only to be paid to the creditor as assignee, and the reasoning of the court there applies to this case. *Taylor v. Wilson* has no application. The only question there was upon the infraction of a special clause in a statute, the point of the contract being contrary to common law, was not and could not have been made.

PATTESON, J.—Here the action is between the immediate parties to the agreement, which distinguishes this case from *Taylor v. Wilson*, which was an action upon a bill by an innocent indorsee. This is clearly an illegal agreement, and falls within the principle of

Gould v. Williams, in which decision I fully concur. Not only is the plaintiff, by the agreement, to receive something to which he is not entitled, but there is also a fraud committed upon the other creditors, because a full and proper disclosure of the insolvent's estate and conduct by a hostile examination is thereby hindered. It is shown by his declaration, that the consideration for the promise was the withdrawal of an opposition which the plaintiff was about to offer. But I go further, if money be promised to a creditor at all to induce him not to oppose, the promise is void. A creditor is not bound to oppose, but if he has the means of doing so, and take money to forbear, that is illegal. It is against the policy of the Insolvency Statutes, and in fraud of the other creditors.

COLERIDGE, J.—This case seems to me to be decided by the reasoning and principles applied by the court in *Murray v. Reeves*. The act of the plaintiff was wrongful, contrary to the policy of the law, and against the interest of all the other creditors, inasmuch as it might lead to their not having the full benefit of the insolvent's property. It may have been a duty of imperfect obligation upon the plaintiff to oppose the insolvent, but he cannot make that breach of duty the foundation of a contract enforceable in a court of law.

Rule absolute. (a)

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INSOLVENT COURT.

February 11, 1852.

(Before the CHIEF COMMISSIONER.)

Re GEORGE WILLIAM DYSON.

Taxation of assignees' costs—Right of insolvent to be present.

Held that the insolvent or his attorney has a right to be present at the taxation of the assignees' bills of costs.

THE insolvent filed his schedule on the 19th of February, 1850. His debts amounted to 39,000*l.* A. Matheson and James Markesell, creditors of the insolvent, were appointed assignees. In August, 1850, a portion of the insolvent's estate was sold for 22,000*l.* of which sum upwards of 15,000*l.* (being the balance of

(a) Wightman, J., was sitting at Nisi Prius in London.

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—Right of in-
solvent to be
present.

the sum of 22,000*l.*, after deducting the amount of the debt due by the insolvent to the vendor of the estate, and 1,500*l.* retained by the assignees for costs) was paid into court. In July, 1850, after the retaining of this 1,500*l.* by the assignees for their costs, no bill of costs of the assignees' attorney had been delivered into court or taxed, and an appointment was obtained from Mr. Richards, the Taxing Master of the court, for the taxation of Mr. Paxon's costs, but he refused to leave his costs to be taxed.

Dowse then obtained a rule on the 23rd of December for the insolvent, and George Henry Taylor his attorney, to be present at the taxation of the assignees' costs, and at the meeting for the audit of the assignees' accounts and proof of debts.

January 13, 1852.—*Sargood* obtained an order *nisi* to discharge that rule.

February 11.—*Dowse* showed cause, and that rule was discharged; the following judgment being delivered by the court:

The CHIEF COMMISSIONER said:—It appears from the proceedings filed in this court that in December an order was made upon the application of the insolvent, and upon reading the affidavit of G. H. Taylor, that the said G. H. Taylor should be permitted to attend the taxation of the costs of the assignees of the said insolvent, and also meetings for auditing the accounts, and for proof of debts. The rule does not express on whose behalf Mr. Taylor was to attend, but as the order was made on behalf of the insolvent, it is to be presumed that it was for him. It has always been the practice of the court to direct that an insolvent, if he asked it, should be entitled to have notice of the taxation of the assignees' costs, and I do not consider that the fact of the insolvent having no interest in the surplus of the estate should deprive him of that right. He must always have an interest in seeing that his estate is divided among his creditors, and in seeing also that no improper charge is allowed, whereby the estate to be divided shall be diminished. Moreover he may be enabled to give such information to the Taxing Master as may materially assist him in that proceeding. For these reasons I consider the insolvent in this instance is entitled to have notice of the taxation of the assignees' costs, and presuming Mr. Taylor to be his attorney, he must be allowed to attend the taxation, and the rule to the contrary of the 13th of January must be discharged. The proper person to object to the order was the assignee, and not Mr. Cook, a creditor, and the court looked to the assignee for the full and proper discharge of the responsibilities he had incurred. One of those responsibilities and the most important is, that of filing an account, and this he has not done. An account has been filed but not by the assignee himself—only by the clerk of the assignees' attorney. Consequently the result is that no proceedings can be taken to audit the accounts, and the proof of debts, and the declaration of a dividend, are all delayed. The result is, that I am of opinion that the insolvent has a right to be present at the taxation of the assignees' costs at his own cost, according to the common

and ordinary practice of the court. Mr. Cook has also a right to be present at the taxation of the assignees' costs, and his own costs as a matter of continuous and uniform practice of the court as he is a creditor now in the schedule; and, if he were not, the court would, perhaps, have considered him entitled to be present, because he has an interest in the surplus estate. The rule, therefore, will be discharged.

*Re GEORGE
WILLIAM
DYSON.
—
1852.
Taxation of
assignees' costs
—Right of
Insolvent to be
present.*

INSOLVENT COURT.

February 21, 1852.

(Before Mr. COMMISSIONER PHILLIPS.)

Re FREDERICK WARD.

Appointment of assignees.

Assignees may be appointed before the hearing and the filing of a schedule.

DOWSE applied for the appointment of Moss Frankford, the detaining creditor of the insolvent, as assignee of the estate and effects of the insolvent under the following circumstances:—The insolvent filed his petition on the 27th of January, 1852, but he had not filed a schedule. It appeared that his father had lately died, and that his sister had been appointed executor, and it was believed that a negotiation between the insolvent and his sister was in progress, for the purpose of selling his interest to the sister, greatly for her benefit, and to the probable injury of the creditors.

Mr. COMMISSIONER PHILLIPS said he should have very little hesitation in appointing an assignee in a case where the insolvent refused to file a schedule, as he could only refuse to do so for some fraudulent or collusive purpose. He should therefore make the appointment.

Application granted.

INSOLVENT COURT.

(Before Mr. COMMISSIONER LAW.)

January 3, 1851.

Re RICHARD HENRY TOLSON.

Creditors' petition—Refusal to file schedule—Setting aside half-pay—1 & 2 Vict. c. 110. s. 56.

Upon the refusal of an insolvent to file a schedule upon the presentation of a creditor's petition, the court, notwithstanding, may proceed to set aside a portion of half-pay for the benefit of his creditors.

THIS insolvent held the brevet rank of major in the army and was in the receipt of the half-pay of an officer of that rank. He was arrested on the 7th of December, 1832, and committed on the 31st of December, in the same year. A creditor's petition was filed on the 27th of February, 1849, and a vesting order made upon it, dated February 28th, 1849. He had, however, refused to file a schedule. The case was before the court upon a former day, when, upon application to that effect, the court granted further time.

Cooke, for the creditors, now renewed his application that 50*l.* per annum of the insolvent's half-pay might be set aside for the benefit of the creditors. Mr. Tolson had not told them what he had received in the prison, and there was a probability that he was receiving a great deal more than his half-pay of 127*l.* per annum. As this gentleman appeared very obstinate, the only way to affect him was to make this rule absolute.

Sturgeon showed cause against the rule upon various grounds.

Mr. COMMISSIONER LAW.—An application was made in March by this insolvent for time to file his schedule. On the 25th of April he asked time again, and from the state of his health, and the alleged difficulty of his accounts, he wanted and obtained more time. The case now came again before the court, and although the insolvent had been seventeen years in custody, this was the first time that this court had any power of acting at all. The case now came before the court in the shape of an application to which I am disposed to accede. There is a certainty that by following this course it cannot do any harm, which might follow if this rule were pledged to last any certain period; but it is not, and if I grant it to-day I may revoke it to-morrow. It is a matter of pure discretion. The insolvent gave no information of his

affairs. This is an application by one of a great many creditors that a certain portion of his half-pay should be set aside for their benefit. Upon the last occasion it was said that a schedule would be filed; to-day there was not a word said about it, therefore the court is set at defiance, and, the probability is, misled formerly by misrepresentation. He kept the court in ignorance of everything; he would tell them nothing. The rule must be made absolute; there would be no harm done if the insolvent was disposed to file a schedule. There is a particular form of reference to the War-office, and if it took effect, his half-pay could not be taken till the next quarter; therefore the insolvent, by filing his schedule, could compel the court to review its decision. The court will then have certain information of the insolvent's income, property, debts, and expenses; therefore, knowing that it cannot injure him, and that there is a prospect of its benefiting him, I shall grant the application.

Cooke said that this gentleman had remained twelve years in custody upon detainers amounting only to 245*l.* It was really quite painful to think that a gentleman would devote himself for the remainder of his life to a prison under such circumstances.

Sturgeon said, the real estates to which he had expectations of succeeding amounted to 25,000*l.* per annum, and he did not wish to pass through the court.

Rule absolute.

The COURT declined to allow costs at present, but observed, it might be a very fit case for an assignee.

NOTE.—This insolvent subsequently filed a schedule, which was finally adjudicated upon on the 12th April, when the insolvent was discharged. No portion of his half-pay appears to have been appropriated to creditors.

Re RICHARD
HENRY
TOLSON.

1852.

Creditor's petition—Refusal to file schedule—Setting aside half-pay.

INSOLVENT COURT.

(Before Mr. COMMISSIONER LAW.)

*August 18, 1851.**Re WILLIAM MINGAYE.*

Creditor's petition—Refusal to come up for hearing—Setting aside half-pay—1 & 2 Vict. c. 110, s. 56.

Upon refusal to come up for a hearing, the court may deal with the insolvent's half-pay for the benefit of creditors.

THIS insolvent was a post-captain in Her Majesty's navy, in the receipt of half-pay at the rate of 14s. 6d. per day. It appeared that Ann Harrison, executrix of Horatio Harrison, deceased, had obtained judgment against him for about 70*l.* She had filed a creditor's petition on the 24th December, 1850, upon which a vesting order was made the day following. The insolvent had filed a schedule on the 7th June, 1851, but refused to come up for a hearing, which had been fixed for the 1st July. His debts amounted to about 1,125*l.*

Parnell now applied for a rule to show cause why a portion of the insolvent's pay should not be set apart pursuant to the provisions of the 1 & 2 Vict. c. 110, s. 56?

Mr. COMMISSIONER LAW granted the application.

The COURT fixed a day for the return of the rule, so as to give the insolvent an opportunity of coming up for a hearing in the interval, or on that day, if he chose.

Rule nisi.

INSOLVENT COURT.

September 16, 1851.

(Before the CHIEF COMMISSIONER.)

PROTECTION CASE.

Re JOSEPH BELL.

Discharge ad interim—7 & 8 Vict. c. 96, s. 6.—Attachment from the Court of Chancery for the nonpayment of money as ordered by the court.

A petitioner who is in custody, and applies for his discharge ad interim, under the 7 & 8 Vict. c. 96, s. 6, will not be discharged unless he is “a prisoner in execution upon a judgment obtained in an action for the recovery of a debt.”

THIS insolvent applied for his discharge under the 7 & 8 Vict. c. 96, s. 6.

Cooke supported.

Dowse opposed the application, and drew the attention of the court to the words of the statute:—“And be it declared and enacted that any prisoner in execution upon any judgment obtained in any action for the recovery of any debt, &c. . . . to whom an interim order of protection shall have been given, shall not only be protected from process as provided by the said recited act, but also from being detained in prison in execution upon any judgment obtained in any action for the recovery of any debt mentioned in his schedule, and if any such petitioner, being a prisoner in execution, shall be detained in prison in execution upon any such judgment, it shall be lawful for the commissioner to order any officer who shall have such prisoner in custody by virtue of such execution to discharge him,” &c. This insolvent was a shareholder in a joint-stock banking company; and, upon the winding up of its affairs in the Court of Chancery, it was found by Master Farrer, to whom the matter was referred, that Joseph Bell was a debtor to the concern to the amount of 1,027*l.* and an order was consequently made upon him to pay that sum into court; but that not being done, an attachment was issued from the Court of Chancery for the nonpayment of this sum, under which the insolvent was taken and now detained in custody under that attachment. It was clear that no description of persons could be discharged except those specified in the act

Re Joseph

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*Attachment—
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of Parliament. The printed notice of these applications, which were usually forwarded to the detaining creditors, and which was in accordance with the language of the statute, had in this instance been altered, and the printed words, "being a prisoner in execution upon a judgment obtained in an action for the recovery of a debt" were struck out, and written words inserted, "being a prisoner under an attachment from the Court of Chancery for the nonpayment of a certain sum of money," &c. This alteration was made by the officer of the court, to make it suit the fact which entirely excluded the petitioner from the class of persons mentioned in the statute. He was, therefore, clearly not entitled to have this application granted.

Cooke, for the insolvent, said:—Certainly the words of the act were as mentioned, but the question was whether, in the equitable jurisdiction of the court, they would not extend the construction of those words to all orders and decrees in the nature of executions upon judgments for debt. The 1 & 2 Vict. c. 110, s. 18, enacted, that all decrees and orders of Courts of Equity whereby any sum of money shall be payable to any person shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom such moneys shall be payable, shall be deemed judgment creditors within the meaning of the act. By this section this order for the payment of money by the Court of Chancery was made equivalent to, and had the effect of, a judgment of a Court of Common Law. He therefore submitted that this petitioner was equitably within the language of this act of Parliament.

The CHIEF COMMISSIONER.—Had it been so intended, it might have been inserted in this act of Parliament. But it is not. Here is the Protection Act, and here is the rule founded upon it. The form, as printed, was in accordance with the rule and the statute, but it has been altered to suit the fact, and was now not in accordance with either. It has been argued that it was intended that these orders of the Court of Chancery should have the effect of judgments of Courts of Common Law. That might be so for the purposes of that portion of that statute (1 & 2 Vict. c. 110), which was for extending the remedies of creditors against the property of debtors. To use the language of the section (s. 18), those who had orders and decrees of the Court of Chancery for the payment of money to them "shall be deemed judgment creditors within the meaning of this act." That clause is not, however, applicable to the purposes and objects of this act. The application must, therefore, be refused.

Cooke applied for short notice to creditors of the first examination.

Interim order granted, but no discharge to issue.

INSOLVENT COURT.

September 16, 1851.

(Before the CHIEF COMMISSIONER.)

Re GEORGE NEWMAN.

Petition under 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96—Petition under 1 & 2 Vict. c. 110—Collateral proceeding.

An insolvent filed a petition under the Protection Acts, but did not come up for his first examination.

Held, that as the petition, under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, had not been dismissed, a petition subsequently filed under the 1 & 2 Vict. c. 110, could not be sustained.

THIS insolvent came up for hearing. He had formerly petitioned under the Protection Acts, but he did not appear for his first examination, expecting to be taken in execution, as there was an execution out against him.

Cooke, for the opposing creditor, objected that, as the insolvent had petitioned under the Protection Acts, he ought to have continued that proceeding, or applied to have the petition dismissed before petitioning under the 1 & 2 Vict. c. 110; as he had not applied for leave to file this petition, it ought to be dismissed.

Sargood, for the insolvent, said he was afraid that the two petitions could not stand together.

The CHIEF COMMISSIONER dismissed the petition.

Petition dismissed.

INSOLVENT COURT.

September 16, 1851.

(Before the CHIEF COMMISSIONER.)

*Re JOHN HOWARD.**Damages in an action for seduction—Practice—Adjudication.*

The court, in delaying the discharge of an insolvent in custody for damages in an action for seduction, will be guided solely by the amount of the damages and the situation in life of the parties. Circumstances of aggravation or extenuation are for the consideration of the jury at the trial.

THIS insolvent came up for hearing, and was opposed by *Douse*, for the detaining creditor.

Cooke, supported the insolvent.

It appeared that in July a writ was issued by the detaining and opposing creditor, in an action for the seduction of his daughter. The action was tried on the 4th November, before Platt, B., at Westminster, when the jury gave a verdict of 200*l.* damages against the defendant, the insolvent. The situation in life of the plaintiff was a brick-burner on the Great Northern Railway, which was not then completed. The insolvent was also in the same business.

Douse proposed to ask the witness what was the age of the plaintiff's daughter?

Cooke objected.

Insolvent examined by *Cooke*.—His counsel, Mr. Serjt. Wilkins, called no witnesses at the trial. He had witnesses to call.

Cooke intimated that if the court desired it, he would call those witnesses now.

The CHIEF COMMISSIONER.—It would be going in the teeth of all the decisions of this court if such a course were permitted.

Cooke said that he knew the practice, but would rather that the insolvent should hear it from the court itself.

The CHIEF COMMISSIONER.—This court is guided by the amount of damages alone in connexion with the situation in life of the parties. Circumstances of extenuation or aggravation are for the consideration of the jury at the trial. My learned brother, Mr. Law, and the Commissioners, have laid down that rule years ago. If there was a verdict by surprise, &c., the defendant might have applied for a new trial. There stands the verdict, and by its amount the court is guided in delaying the insolvent's discharge.

Cooke was quite aware that the court was bound by the verdict, and that they could not inquire what the character or conduct of the young woman might be.

The CHIEF COMMISSIONER said that this was one of those cases expressly provided for and set out as a ground of delay in the discharge under the 77th section of this act, where a variety of cases had been stated, descriptive of the different kinds of improper conduct for which insolvents may be remanded, confining the period of prolonging the imprisonment to two years. Now that court had again and again declined to try these cases over again. It had been submitted to a jury, and he must suppose that everything necessary had been submitted to the jury. He could not understand this sort of excuse, that witnesses had not been called. Very likely the defendant's own counsel thought it was the best course to follow. All that they could do was to have regard to the amount of the damages, and the situation in life of the parties before the court, because what would be heavy in one situation of life might be extremely light in another. These parties were in a very humble sphere of life, and 200*l.* damages was therefore no inconsiderable sum; and it is manifest the jury did not consider it a slight case of the sort. It was moreover extremely likely that the jury took into consideration the fact of this plaintiff being a married man, and therefore incapable of making the only reparation in his power. He, therefore, acting upon the principles to which he had adverted, namely, the amount of the damages and the situation in life of the parties, his adjudication was, that the insolvent be declared entitled to the benefit of the act except as to the suit of this creditor, at whose suit he would be discharged when he should have been in custody for a period of ten calendar months from the date of his vesting order.

Remanded for ten calendar months.

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HOWARD.*

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*Damages—
Seduction—
Adjudication—
Practice.*

INSOLVENT COURT.

*September 16, 1851.**Re JAMES FISHER.**1 & 2 Vict. c. 110—Allowance of costs of opposition.*

The allowance of costs of opposition in individual cases of opposition, under the 1 & 2 Vict. c. 110, is the exception and not the general rule of practice.

THIS insolvent had been heard before Mr. Commissioner Law, and opposed by *Cooke* for a creditor. The learned counsel again appeared to ask for judgment.

The COURT remanded the insolvent for six calendar months, under the discretionary clause (s. 76.)

Cooke applied for the costs of opposition.

The CHIEF COMMISSIONER would allow the costs of opposition in this case, but he wished it to be understood that the allowance of the costs of opposition in individual cases of opposition, under the 1 & 2 Vict. c. 110, was the exception, and not the general rule of practice.

Costs allowed.

INSOLVENT COURT.

*September 16, 1851.**Re BENJAMIN HOPE.**Bail—Amending description of.*

Where the residence of a surety is misstated in his affidavit, the court will not allow it to be amended, and the bail will not be accepted.

THIS insolvent applied to be admitted to bail, and tendered sureties for his appearance at the hearing. It transpired upon the examination of one of the proposed bail by the attorney of the detaining creditor, that his son was really the landlord of the house in which he resided generally, and which was given in the affidavit of bail as his residence, but that he had advanced the money to him to take the business which he carried on there, and paid all necessary expenses of rent and taxes, which the son was unable to pay. He himself also carried on the business of a manufacturer there, and had property elsewhere.

Cooke having been heard for the insolvent,
The COURT rejected the bail.
The bail said he had a residence in Market-street, and if the
description was incorrect it was an error of the attorney.
Cooke applied to amend the description, by substituting Market-
street.
The CHIEF COMMISSIONER refused the application.

Re BENJAMIN
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LORD CHANCELLOR'S COURT.

March 3, 1852.

(Before LORD ST. LEONARD'S, L. C.)

SPOONER *v.* PAYNE.

Insolvent—Assignee—What property passes to—Compensation to Commissioner of Bankrupts—Jurisdiction—1 & 2 Vict. c. 110, s. 56, considered.

The annuity awarded as a compensation to a Commissioner of Bankrupts, whose duties were abolished by the 5 & 6 Vict. c. 122, passes to his assignee on his insolvency, and is not within the excepted cases mentioned in 1 & 2 Vict. c. 110, s. 56.

Where such an officer, having become insolvent, refused to make the affidavit (required by the order for the payment of the annuity) that he has not held and does not hold any office of emolument, &c., the Court allowed other evidence to be given of that fact, to enable the assignee to receive the annuity.

Such an officer is not in the service of Her Majesty, within the meaning of the 56th section of the 1 & 2 Vict. c. 110.

THIS was an appeal from the decree of the Vice-Chancellor Knight Bruce. The facts were these:—At the time of the passing of the 5 & 6 Vict. c. 122, the defendant, Charles Henry Payne, was a Commissioner of Bankrupts for the county and district of Bristol, and he had been such a commissioner for several years, and was one of the commissioners under the 1 & 2 Will. 4, c. 56. By the 58th section of the statute 5 & 6 Vict. c. 122, the Lords Commissioners of the Treasury were empowered to award to Commissioners of Bankrupts whose duties were abolished by that act, compensation by way of annuity, and specify the amount to the Lord Chancellor, who should thereupon have power to order the amount to be paid out of the Secretary of Bankrupts' Com-

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pensation Account, and the same should "be payable and paid accordingly to such respective persons, without any deductions whatsoever," subject to the proviso that such annuity should not be paid at any time to any commissioner who, at any time after the commencement of the act, should be appointed to hold any public office or employment of an annual value greater than the annuity to be so certified as payable to him, so long as any such office or employment should be so held. Under a certificate made in pursuance of the act, the defendant was awarded an annuity of 199*l.*; and by an order of the Lord Chancellor, dated the 28th of February, 1844, such annual sum was ordered to be paid out of the Secretary of Bankrupts' Compensation Fund, subject to the terms and conditions of the certificate, "and upon proof to the said accountant in bankruptcy by the affidavit of the party entitled to any such compensation, that he has not held, and does not hold any such office or employment, and that he has not been, and is not, in the receipt of any such yearly sum of money as in the said act and certificate mentioned;" and his lordship further ordered, "that the annual sums aforesaid should be paid on or before the 12th of November in every year, the first of such payments to commence from the 11th of November, 1842." The compensation annuity had been regularly paid to the insolvent up to the 12th of November, 1846, inclusive. The defendant had not, since the said order, held any office, or appointment, so as to lose the said annuity; but on the 26th July, 1847, the defendant, having been for more than twenty-one days a prisoner in the Queen's prison in the county of Surrey, charged in execution for debt, the Court for the Relief of Insolvent Debtors, upon the petition of James Spooner, a creditor (the plaintiff) made the usual vesting order under the 1 & 2 Vict. c. 110; and in the month of August following, the plaintiff was appointed sole assignee of his estate. On the 12th of November, 1847, another annual payment of 199*l.* became due, and the plaintiff applied to the accountant in bankruptcy for payment of that amount, and of all future sums to become due in respect of the compensation. The accountant having refused to make the payment to the plaintiff, he thereupon presented his petition in bankruptcy to the Vice Chancellor, who, on the ground of having no jurisdiction, dismissed the petition: (*Ex parte Spooner*, 1 De Gex, 575.)

The present suit was instituted by the assignee against the insolvent and the accountant in bankruptcy, and the bill prayed that it might be declared that the annuity of 199*l.* for the life of the defendant had become and was vested in the plaintiff as his assignee; and that the arrears then due, and all sums to become due in respect thereof, might be ordered to be paid to the plaintiff; and for an injunction to restrain Payne from receiving, and the accountant from paying such annuity to any other person than the assignee for the time being of his estate and effects. The plaintiff gave notice of motion for an injunction to restrain the defendant Payne from receiving the annuity. The defendant demurred to

the bill; and on the hearing of the motion and demurrer by the Vice-Chancellor Knight Bruce, his Honour overruled the demurrer, expressing the inclination of his opinion to be against the defendant under the 1 & 2 Vict. c. 110, s. 56; but said, whether the word "pension" were considered in its sense etymologically of payment generally, or according to its more common and confined sense, it might be doubtful whether the annual payment to the defendant Payne was within its meaning. The cause was heard by the Vice-Chancellor Knight Bruce, on the 19th of July, 1849, when his Honour was of opinion that the annuity was not rendered unassignable by the 1 & 2 Vict. c. 110, s. 56, nor did he think the case within 4 & 5 Will. 4, c. 24, s. 19, on which the case of *Wells v. Foster*, 8 M. & W. 149, proceeded. But as to the interest of the public, which had been argued, his Honour doubted whether, as the public paid the retiring pension, it had not an interest in its ceasing at an earlier period than the death of the annuitant, as one of the modes in which it might cease was by the appointment of the annuitant to an office of greater value. To be fit to receive such an appointment, he must be a person not deprived of the decencies of life, or of the means of appearing externally respectable. The public had an interest in continuing him in such a position as might enable him to receive an appointment, on which his pension might cease. His Honour originally thought that that was not such an interest as ought to be regarded, but subsequent consideration, and the case in the Court of Exchequer, which had been referred to, induced him to view it as entitled to more weight.

On a subsequent day his Honour directed a case to be stated for the opinion of the Court of Exchequer, and the following questions were submitted:—

First, whether, upon the construction of the 5 & 6 Vict. c. 122, the certificate of the 14th February, 1844, under the hands of the Lords of the Treasury; the order of the Lord Chancellor, dated the 28th February, 1844; the order of the Court for the Relief of Insolvent Debtors appointing a provisional assignee; and the above-mentioned order of the 28th of August, 1847; and upon the construction of the 1 & 2 Vict. c. 110, s. 56, the defendant Payne, notwithstanding his insolvency, was still entitled to the annual sum of 199*l.* awarded to him by the said certificate of the 14th of February, 1844, for such compensation as was therein mentioned.

And, secondly, whether, upon the construction of the said acts of Parliament, under the said certificate and orders, the said James Spooner, as assignee of the said insolvent C. H. Payne, became entitled to the said annual sum of 199*l.* so awarded to the said insolvent as aforesaid for such compensation as aforesaid.

The case was argued, and the judges certified.

First, that the defendant Payne was not still entitled to the said annual sum of 199*l.*

Secondly, that, under the Insolvent Act, and the proceedings

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had therein, the defendant Payne's right and title to the annuity vested in the plaintiff as his assignee: (*Spooner v. Payne*, 4 Ex. 138.)

On the 3rd of July, 1848, the cause came on to be heard on further directions on the equity reserved, and on the certificate, when, by the decree, it was declared that the plaintiff was entitled to receive the payments then due, and thereafter to accrue due, in respect of the annual sum of 199*l.* granted by the Lords of the Treasury to the defendant Payne. Some time after this decree was made, the plaintiff presented a petition to the Lord Chancellor, stating that the solicitors of the plaintiff had applied to the defendant Payne personally, and requested him to make the affidavit required, for the purpose of entitling him to the salary according to the above-mentioned order of the 28th of February, 1844, and to give all other necessary facilities for enabling the plaintiff to receive the arrears of the 199*l.*; that the defendant Payne absolutely refused to do so, and that the accountant in bankruptcy, declined to pay the annuity without the further order of the Lord Chancellor dispensing with the affidavit of the defendant Payne, required by the order of the 28th of February, 1844, and praying that the accountant might be ordered to pay to the plaintiff as such assignee as aforesaid, the annual sum of 199*l.*, and all arrears thereof, upon proof to such accountant by the affidavit of the plaintiff, that according to the best of his knowledge and belief, the defendant Payne had not held, and did not hold any such office or employment, and that he had not been, and was not in the receipt of any such yearly sum of money as in the act and certificate mentioned, or upon such other proof thereof as the Lord Chancellor should think proper to direct. The Lord Chancellor, on the hearing of that petition, considered that he had no jurisdiction to depart from the award of the Lords of the Treasury, and directed it to stand over in order that the petitioner might have an opportunity of presenting a memorial to them if he thought fit. Such memorial was, it is understood, presented to the Lords of the Treasury, who considered that they had no authority to issue any new certificate. From these decrees and orders the defendant Payne appealed.

Daniel and Wright appeared in support of the appeal.

Bacon and Faber were for the respondent, and the present being an appeal from the whole decree, opened the case.

The cases of *Hill v. Paul* (8 C. & F. 295, 306); *Flarty v. Odium* (3 T.R. 681); *Lidderdale v. Duke of Montrose* (4 T.R. 248); *Stewart v. Tucker* (2 Bl. Rep. 1137); and *Wells v. Foster* (8 M. & W. 149), were cited.

Bacon, in reply.

THE LORD CHANCELLOR.—I am clearly of opinion that the appeal in this case cannot be sustained. The case is a very simple one. Mr. Payne was a country commissioner in bankruptcy, and he became entitled to compensation. That compensation was properly vested in him beyond all question, and unless upon some special ground, either upon the policy of the law, or upon some

condition imported into or implied into the grant, that property would pass under the general provisions of the Insolvent Debtors' Act as a part of his general estate; that is, unless, according to the section of the act of Parliament which has been referred to, words should be found which should except this property out of the general enactment. Now, in the first place, it is quite clear that this case does not fall within the decision of the case of *Wells v. Foster*, because the ground of that decision clearly was, that there was a continued right to the service of the person who had the pension assigned to him, and therefore the Crown had a right to look to the continuance of the service in the person of the officer for the payment of that sum of money which had been awarded to him. Nobody can doubt the propriety of that decision, but it would be difficult to make the principle apply to this case. The Vice-Chancellor thought there were grounds of public policy of a somewhat different nature, although rather of the same character, viz.: he thought that as this particular compensation was to cease, either wholly or *pro tanto*, according to the amount of the income which the officer might in future acquire, that Mr. Payne might have an office conferred on him, and therefore the public, who were interested that the compensation should cease, had an interest to this extent, that his respectability ought to be kept up by means of this payment, so as to enable the Crown or the Government to confer that office upon him. I do not understand that very learned judge to have persevered, or rather to have continued to express that opinion; on the contrary, I collect, from what passed afterwards, that he withdrew from that opinion, and my own impression strongly is, that that cannot be maintained. It does not stand upon the same ground, and will not bear, therefore, being placed upon the like footing. Now, supposing that to be so, upon the general nature of it, then it is said it is impossible it should be assignable, or become property, because it has not the incidents of property. Now, let us see how that is with regard to Mr. Payne himself. It is said that till the year has expired, and he makes an affidavit, that he has not an office, and has not acquired another office, the money never becomes payable, and it is only payable when he has made the affidavit, consequently it is argued, and very well argued, that in that case there is no human mode of compelling the affidavit to be made, and, consequently, no property vested; but, from the moment when this grant was made, this was property existing in Mr. Payne, to which he or his representative is or will be entitled; and although, in order to show that he has not forfeited, or lost, or been compensated for the amount which is thus payable to him, he is to swear that he has not received from the Crown or the Government certain other payments, that is simply to verify the fact that the case has not occurred which is provided for by the condition annexed to the grant; it is necessary that that fact should be proved, and if he dies without proving it, the fact will be proved by some other evidence. Suppose he were

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to die when there was a half-year's compensation due to him, he would be entitled to that half-year's compensation, and it would form part of his assets, and there would be some other proof in the event of his not being alive to give that particular proof; some other proof would be given in order to show that his representatives were entitled, as they would be entitled, to this particular portion of the compensation for the year. Then does it vary because the property has been in the possession of an assignee? I think it only amounts to this, that there is no condition imposed upon the property which makes it personal upon Mr. Payne; there is no condition to be performed which is not capable of being performed, and although it may be a clog upon the enjoyment of the property when alienated, there is nothing to prevent the alienation; there is no clog upon the alienation of the property itself; it is, in fact, to say that Mr. Payne cannot assign the property *qua* property, and yet to say when he has assigned it he may himself by his own withholding of a document which is necessary to get possession of it, prevent the receipt of the property. Now, supposing the property were to accumulate in the way in which it has accumulated; suppose it were from want of power, which I hope will be found does not exist, that it cannot enforce the payment of the money to the person to whom it should belong when Mr. Payne should die, beyond all question if the property has passed to the assignees, then the assignees will not be prevented from taking it because that impediment has arisen, but other evidence will be admissible to show that he never did hold any other office. It cannot be supposed for a moment that in order to enable the representatives to get the money it is a necessary and absolute condition that the man himself should make an affidavit when you can show the fact that his death took place during that particular period. Suppose, also, the case of lunacy. Would any one say that Mr. Payne was to be deprived of the property because an act of God had visited him by which he had been deprived of the power of making an affidavit? Therefore I apprehend clearly that the property, although it may accumulate, when so accumulated, belongs to the assignees, provided always that it has passed to them. Upon all general principles I should say it would pass to the assignees, and by the provisions of the Insolvent Debtors' Act, it would pass under the first part of the act, and then the question comes whether or not it falls within the 56th section? Now the words of that act are, that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of Her Majesty in the customs or excise, or any civil office or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk, or otherwise employed in the Court of Directors of the said Company, or being otherwise in the enjoyment of any pension whatsoever under

any department of Her Majesty's Government, or from the said Court of Directors, to the pay, half-pay, salary, emoluments, or pension of any such prisoner for the purposes of this act. The words are, "being or having been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the service of Her Majesty, in the customs or excise," which must be "the service of Her Majesty, or any other civil office or other department whatsoever." Those words are still governed by the words "the service of Her Majesty." Well, then, it is to be an employment in the service of Her Majesty, and then it says the act shall not extend to that. But I am clearly of opinion that this person was not in the service of Her Majesty, and, therefore, not within that exception. I believe before the act under which Mr. Payne was appointed a country commissioner in bankruptcy, it was usual to single out attorneys and persons of that description in the country to act as commissioners, just as a fiat or a commission of bankruptcy was directed to them. In that case, therefore, it was merely in the ordinary course of business, for the purpose of facilitating the administration of proceedings in bankruptcy. The section, instead of taking it out of the general operation of the act, and making it depend upon the act of the debtor, provides that the assignee shall, upon application, be entitled to a pension. And to whom was the application to be made? To the heads of the department. It is not intended, therefore, by the act, that an officer, for example, because his half-pay could not be assigned, should retain the whole of his half-pay, and set his creditors at defiance; but the parties who then represented the Government, and do represent the Government, have a duty to perform, and to see that a fair portion of the half-pay is allotted to the officer, and at the same time that justice is done to the creditors; and they, therefore, have the power given to them to apportion the half-pay to the creditors and to the officer. Where is the provision with regard to Mr. Payne which is to exempt him from the operation of this act? Can anybody suppose that a person in the situation of Mr. Payne, a country commissioner in bankruptcy, with 200*l.* a-year compensation, is to set his creditors at defiance, and to claim the whole of the income whatever it might happen to be, without making any compensation, or the least contribution to his creditors, when every person here—persons of the highest grades in the military or naval service—although the half-pay is protected on the ground of public policy, yet they are obliged to give up a portion of their half-pay to their creditors upon the award of a competent officer. I am clearly of opinion that this case falls within the general provisions of the Insolvent Debtors' Act, and that it is utterly impossible to include this person in the exception in that act. If, therefore, as it appears to me, this property was assignable, then the consequence is that the assignees would be entitled to take it. I believe that Mr. Payne, and who, by the nature of his office must know what his duty is, when he knows what the decree of the court is, will willingly give his assistance to

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enable his assignees to receive the fund in order to distribute it among his creditors. This petition, therefore, must be dismissed, but (as this gentleman sues *in formâ pauperis*) from the form in which the bill is filed, of course it cannot be dismissed with costs.

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Mr. Payne having refused to make the affidavit required by the Lord Chancellor's order, the assignees were unable to obtain payment of the annuity; and upon the application of the assignees, the Lord Chancellor made an order that, on the assignee making an affidavit that the insolvent had refused to make an affidavit, and that he, the assignee, had made inquiries, and that to the best of his belief the insolvent did not hold any office, &c., the money should be paid, and as to accruing payments, the assignee was from time to time to furnish similar substituted affidavits, and thereupon the order for payment was to be made without a formal petition, with liberty to the accountant in bankruptcy to apply.

July 12.

INSOLVENT COURT.

March 6, 1852.

(Before Mr. COMMISSIONER PHILLIPS.)

Re STEPHEN WILLIAMS, Clerk.

Liability of assignees.

A. being assignee of the estate of W. deposited money in the bank of N., which bank failing, the money was lost.

Held, that if the assignee exercises the same care of the trust property as he would of his own, and is not guilty of negligence, and does not in depositing or distributing the funds deviate from the ordinary course of business or practice, but debits himself with the trust funds as a separate account, he is not liable.

CERTAIN moneys amounting to between 300*l.* or 400*l.* belonging to this insolvent's estate, in the hands of the assignee, were deposited by him in the Newport bank, and the bank failing, the funds were lost. A dividend had been declared, but in consequence of the failure of the bank and the loss of the funds, the creditors

entitled to dividend were not paid; and the question arose, whether the assignee was personally liable to make good the loss to the creditors entitled to dividend. To try the question—

Cooke, upon a former day, obtained the following rule:—"That Richard Mullock and Lewis Edwards, the assignees of the estate and effects of the said insolvent debtor, upon notice of this rule to be given to them, shall, on the 6th of March, 1852, peremptorily show cause before the court for the Relief of Insolvent Debtors in the Court of Charles Phillips, Esq., commissioner, at the Court-house Lincoln's-inn-fields, in the county of Middlesex, why they should not forthwith pay to the said Mr. Charles Mullings, one of the creditors of the said insolvent debtor, the sum of 29*l.* 12*s.* 1*d.* the dividend due on his debt, and why they should not pay the costs of this application." The rule was granted upon the authority of *Re Augustus Applegath*, 2 Dea. & Ch. 101; and *Ex parte Keys, re A. Applegath, Ex parte Watson*, 2 Dea. & Ch. 633.

Nichols now showed cause on behalf of the assignees.—The rule was granted on the affidavit of Mullings, and he trusted that he should satisfy the court that it ought to be refused, and with costs. A dividend of 2*s.* 6*d.* was declared, and ordered to be paid on the 13th of October. The moneys belonging to the estate had been paid into the old branch bank at Newport, which had failed.

Mr. COMMISSIONER PHILLIPS.—Is not the sole question here, whether the assignees are liable to the risk if a bank failed in which they had deposited the moneys belonging to the insolvent's estate?

Nichols.—Yes; but the observation he wished to submit was, that the facts disclosed in the affidavit did not raise the *prima facie* case against the assignee. He would refer to the cases which showed the extent of the liability of the assignee, and it would be seen from them that the assignees were not liable in this case. The affidavit on which the rule was obtained was deficient. In the first place the creditor had only told them one-half the facts within his knowledge. An assignee who receives the moneys of an insolvent's estate into his possession and they are lost, was not responsible, unless the creditors could show negligence or fraud. He would prove distinctly that there was neither fraud nor negligence. He would show further, that the assignees had not deviated from the ordinary course of business, and that there was no reason for supposing that the bank was not a perfectly fit place to deposit the money; and under these circumstances it was not the accidental circumstances of the bank failing that made an assignee liable. If the creditor wished to make out a case, he must show that the assignees' conduct was not consistent with the ordinary course of proceeding, and that the local bank was not a perfectly fit place of deposit.

Mr. COMMISSIONER PHILLIPS.—The date of the declaration of dividend was the 27th September, 1851, and the bank stopped on the 7th October, 1851.

Nichols.—Yes. Affidavits were then read showing the course of dealing; that the bankers up to the period of failure, were

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persons of unimpeachable credit, and that the bank had been established for many years. That the accounts of this estate were from time to time drawn up, and the money deposited in this bank at Newport, without any objection being made by the creditors or by this court. That they had used all reasonable care and diligence in this matter, in the same way and to the same extent that they would have done in their own affairs. That the money, as soon as it was received, was deposited in the bankers' hands. That this was the ordinary practice, and the account was kept in their names as assignees. That this creditor had received three dividends, and been paid by cheques on these very bankers, who allowed interest on the trust money deposited at the rate of 3 per cent. That there was an account in 1846 in the hands of the auditor of the court, showing that moneys belonging to this estate were in the hands of the bankers, and the interest paid. This practice has been pursued from time to time since, and it is apprehended that that has been the usual course of dealing in matters of this sort. There is no rule that moneys belonging to insolvents' estates should be paid into court. If the court had made an order to that effect, it would doubtless have been obeyed, as it could make no earthly difference to them. But most of the creditors lived at Newport. It was therefore convenient to have the money there. The 62nd section of the act prescribed some of the duties of the assignees, but it nowhere states where the money was to be placed. There was, therefore, clearly no negligence. He would now call attention to the case of *Massey v. Banner* (1 Jacob & Walker, 241.) There it was held by Lord Eldon that an agent acting gratuitously might be charged with loss arising from the failure of his bankers where he had paid in the money to his own account, but not where they had kept a separate account of the trust-fund, as in this insolvent's case, and that assignees, trustees, agents, &c., were only expected to take the same care of trust funds as a reasonable attention to their own affairs would dictate to them to take care of their own property. Lord Eldon in the course of his judgment observes,—“There is one case which is quite familiar in this court—that of assignees. If an assignee pays money into his banker's hands as money belonging to the estate, and the banker fails, the assignee is undoubtedly clear from the loss.” The court did not expect them to take more care of trust property than they would of their own. That was the principle.

Mr. COMMISSIONER PHILLIPS.—I think that case decisive if this money is kept in the names of the assignees to the separate account of the estate.

Nichols.—There is another case, before Chief Justice Tindal (*Raw v. Cutten*, 9 Bing. Rep. 96; Macrae's Insolvent Pract. 483), to the same effect. The assignees had, for a course of years, dealt with the estate beneficially for the creditors. They had not dealt fraudulently, nor used the money for their own benefit. There were no laches on their part. The dividend was payable on the 13th October; but the bank failed on the 7th October. They

had conformed throughout with usage, and there was no evidence that they had acted improvidently in depositing the money.

Cooke contrà.—The clear rule of law and of common sense was, that the assignees should be held liable for all moneys received; and if an assignee was to be charged, and a case made against him, it must be one of exception. Their case was, that Mullock must have been aware, because he was paid by cheques upon this very bank. Now, in the first place, the question was, whether they kept their account as assignees *quà* assignees. The probability is, that it was not so. The affidavit contained nothing sufficiently distinct on that account. As to the case of *Raw v. Cutten*, that would not apply, unless they show that all the facts of that case dovetail with this. That might have been done in the affidavit; but it was not done. All the cases went upon this principle, that where no fraud appeared, and where reasonable precaution had been taken, and where the assignees had acted in the ordinary course of business, they were not liable. But the cases went further: if a man was knocked down in the road and robbed, the plundered man was not held liable for the loss of the money of his principal. Here there was a means of protecting the money by paying it into this court. The assignees were therefore clearly liable.

Mr. COMMISSIONER PHILLIPS.—Lord Eldon stated that if an assignee took the same care of a trust fund as he would of his own, and kept a separate account at his banker's of the trust fund, he was not responsible for accidental failures of the agents employed. There was no distinct allegation in the affidavit that this money was kept to the separate credit of these gentlemen as assignees. His opinion must therefore be suspended till a supplemental affidavit was filed upon that point. But if that was ascertained to be as alleged, and if the bank was in good credit at the time of the deposit of the money, the assignees would not be liable. The general principle laid down by Lord Eldon, namely, that the court does not expect a party to take more care of the property of others than of his own, was equity itself. This bank was the one in the county to which every person was turning to place his deposits. It was of known credit, and general confidence was placed in its management. The charge of negligence could not, therefore, be brought against the assignee. There was no allegation of want of due diligence. He could not see how this case could be distinguished from that before Lord Eldon, and from those reviewed by Lord Chief Justice Tindal in *Raw v. Cutten*, in which the assignees were held not liable, leaving out of view one point of difference in which the cases in the Courts of Bankruptcy were broadly distinguishable from those in this court. In bankruptcy, where a man paid money into his own banker's, and a loss occurred, he was liable, because he contravened the statute; but here the case was different. No statute or rule of court had been contravened by the payment of this money into the bank at Newport by the assignees. It was more convenient that the money should be paid in there, and in

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this court the assignees had an option. Under these circumstances, if a supplemental affidavit was filed stating distinctly that the assignees had deposited the money to their separate account as assignees, he should hold them not liable to make good the loss to the creditors from the failure of the bank.

The case was adjourned to file a supplemental affidavit of that fact.

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Nichols now produced a supplementary affidavit to the effect that the account in the bank had been kept to the separate account of the assignees in their joint names as trustees for the creditors.

Mr. COMMISSIONER PHILLIPS said that being so, the law was clear. The case was an exception to the general rule affecting the liability of assignees.

Nichols applied that the rule should be discharged with costs.

Cooke opposed the application.

Mr. COMMISSIONER PHILLIPS said that he thought it would be hard to mulct the creditor with the costs of a motion which everybody would say *prima facie* should be granted. He must, therefore, refuse costs.

Rule discharged, but without costs.

INSOLVENT COURT.

(Before Mr. COMMISSIONER PHILLIPS.)

March 1, 1852.

PROTECTION CASE.

*Re WILLIAM NASH and JOHN CHAPPELL.**Parting with property within three months of the date of the petition.*

*N. and C. executed a bill of sale by way of mortgage, dated July 29th, 1851, which provided for the redemption of the goods and chattels mentioned by quarterly payments of 25*l.*; the first quarterly payment to be made on 25th December, 1851, and in default of that or succeeding payments that the mortgagee should have the power of seizure and sale.*

Default being made in the payment of the first quarterly instalment, the mortgagee seized and sold.

N. and C. filed petitions under the Protection Acts, on the 4th February 1852, and the seizure and sale of the property mentioned in the mortgage with the bill of sale annexed, by the mortgagee, having been made within the three months preceding the date of the petition:

Held, that the property was parted with at the date of the execution of the deed, and therefore that this was not a charging or parting with property within three months of the petition by the insolvents.

THESE insolvents appeared to-day for their examination upon their interim order. They were opposed by *Sargood*, for a creditor. *Duncan* supported the insolvents.

The insolvents had filed their petitions on the 4th February, 1852, and the petitions contained the usual allegation, "That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and his family, and the necessary expenses (not exceeding £) of his petition, or in the ordinary course of trade), at any time within three months of the date of filing this his petition, or at any time with a view to this petition."

It appeared that in July, 1851, the insolvents executed a bill of sale, by way of mortgage, to one Hubbard, to secure the repayment of 198*l.* being the amount of moneys previously advanced

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by him. To the mortgage-deed was annexed a bill of sale, enumerating the goods and chattels mortgaged, twelve horses, eight cabs, &c. The bill of sale provided for the redemption of the property by payments of 25*l.* quarterly, the first quarterly payment to be made on the 25th December, 1851, and in default thereof, for seizure and sale by the mortgagee. Default was made in December, when the first quarterly instalment became due, and a seizure and sale of the goods and chattels took place forthwith, and within three months of the date of the petitions.

Sargood submitted that this was a charging or parting with property within the three months. There had been no delivery until within that period, and he drew attention to the following special covenant in the deed:—"Provided always, and until default be made in payment of the said sum of one hundred and ninety-eight pounds, at the times and in the manner hereinbefore mentioned for the payment of the same, it shall be lawful for the said William Nash and John Chappell to have, use, and enjoy the use of the said horses, carriages, harness, stable utensils, and effects, as specified in the schedule hereafter written." The insolvents were to have the absolute control and possession of the property till default made, and it was not until after that period that the insolvent could be said to have parted with his property.

Duncan contended that there was no parting or charging of property by the petitioners within three months of the date of his petition. The date of the bill of sale in July was the time upon which the legal estate and the property were divested from the petitioners and invested in Hubbard, the mortgagee. The powers of redemption contained in the bill of sale were merely powers by which, if complied with by the insolvents, the property would again revest in them. The words "parting with property" referred to the legal estate, and was fulfilled at the moment the insolvents divested themselves of the legal estate. The property then vested in Hubbard, subject to be redeemed upon the payment of the instalments in the terms of the covenant. This deed was on a par with all other mortgages where the mortgagees were not in possession until default made in the covenants; and further, there was no delivery of chattels required at the date of the bill of sale by way of mortgage, any more than there would be any absolute delivery of houses, lands, or chattels under an ordinary mortgage upon the usual covenants. [Mr. COMMISSIONER PHILLIPS.—Suppose an execution had issued within a month after giving the deed, could the execution have been satisfied without first paying the mortgage creditor?] Certainly not. If a judgment creditor, after the date of the mortgage, seized the chattels enumerated in the bill of sale, he would, upon an interpleader issue brought by the mortgagee, be compelled to deliver up possession of the goods, or at all events to pay the mortgagee's debt before realizing for himself.

Sargood, in reply, contended that, upon a mortgage of chattels there must be a delivery to the mortgagee to constitute a "parting"

with property within the meaning of the act. Here the insolvents were in possession till default was made in payment, and there was a special covenant to that effect.

Duncan suggested that, as this was a novel point, and of importance, the Commissioner would consult his learned brothers. The coming into possession was not the time of parting with the property. When the insolvents executed the deed in July they transferred the legal estate, leaving only the beneficial interest in them upon the payment of certain sums.

Mr. COMMISSIONER PHILLIPS adjourned the case with the view of consulting his brother commissioners.

Monday, March 8.—Mr. COMMISSIONER PHILLIPS intimated, upon the authority of *Gale v. Burnell* (14 Law J. 340)(a) that the charging of and parting with the property by the insolvent took place at the date of the execution of the deed. The objection of the learned counsel (Sargood) that the property was charged or parted with within three months of the date of the petition, must be overruled.

Petition sustained.

(a) The following is the note of the case *Gale v. Burnell*, which, from its importance in this practice, is subjoined:—

“A. by bill of sale in 1843, in consideration of 518*l* absolutely assigned to B. all and every the goods and furniture, &c. which then were, or which at any time during the continuance of the security should be in, about, or belonging to the dwelling-house of A. at N. Then followed a proviso—‘In case A. shall cause to be paid to B. the said sum of 518*l* on the 1st of January, 1845, or at such earlier time as B. shall appoint by notice in writing to A. ten days before the time in such notice appointed for payment, and shall, in the meantime, pay to B. interest thereon half-yearly, then these presents, &c. shall be absolutely void.’ It was further agreed that, after default made by A. in payment of the principal and interest after such notice, it should be lawful for B. peaceably to take into his possession, and thenceforth to hold and enjoy all and every the said goods, &c. thereby assigned, and to sell the same, and to pay the expenses and his own debt, and afterwards to pay the surplus to A.; and further that until default as aforesaid it should be lawful for A. to hold, make use of, and possess the said goods, &c. (including corn, hay, and other agricultural produce.) A. remained in possession for a year, and then in January 1844 gave formal possession to B. of all the goods then on his premises. No notice in writing was given to A. requiring payment of the principal or interest.

“Held, that this was a present conveyance by which the property of all goods on the premises at the time of its execution passed to B.; but that goods brought upon the premises by A. after the execution of the bill of sale did not pass under it:” (*Gale v. Burnell*, 14 L. J. Rep. (N. S.) 340, Q. B.)

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(Before Mr. COMMISSIONER PHILLIPS.)

PROTECTION CASE.

*Re JOHN ECCLESTONE.**Last examination—Appointment of creditors' assignee.**Held, that there is no power to appoint creditors' assignee upon the day for granting the final order, unless the first examination has been adjourned for that purpose.***T**HE petitioner came up for his final order.*Nichols* applied for the appointment of A. B. as assignee of the estate and effects of the petitioner. An application had been made for the appointment of another gentleman on the day for the first examination of the interim order, but the court having put some questions to him, considered him disqualified. Under these circumstances an assignee being found desirable, probably the court would entertain the present application.**Mr. COMMISSIONER PHILLIPS.**—The act of Parliament does not enable me to appoint an assignee on the day for the final order.*Nichols*.—The statute is not prohibitory, it is only declaratory.**Mr. COMMISSIONER PHILLIPS.**—The act points out the time when the court is to appoint an assignee, and then, and then only can I do it. My opinion is that all the assignee's acts would be invalid if I made the appointment to-day. The words of the act are, “and the commissioner shall appoint a public sitting of the court for the first examination of the petitioner, and the commissioner may adjourn such sitting from time to time . . . and the choice of the creditors' assignee shall take place at such sitting or on any adjournment thereof:” (7 & 8 Vict. c. 96, s. 3.) How can I appoint an assignee on the day for the final order, when the act expressly states that the appointment shall be made at “such sitting,” that is; the first examination, or some adjournment thereof?*Nichols*.—That is merely an intimation to the creditors of the time. I suppose you will entertain the case to-morrow or any day. I should have thought an assignee might be appointed at any time.

Mr. COMMISSIONER PHILLIPS.—So should I but for the Act. Get the enactment repealed, and I shall have no difficulty.

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Nichols.—The Chief Commissioner sometimes adjourns the first examination to the day for the final order, for the purpose of making an appointment.

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Mr. COMMISSIONER PHILLIPS.—I should have no objection to that course, but no application was made on the first examination for that purpose.

Nichols.—I was not in the case then.

Mr. COMMISSIONER PHILLIPS.—At the first examination a gentleman presented himself unqualified. I will most willingly adjourn the first examination for the appointment of an assignee when it is necessary.

Nichols.—A rule never to appoint an assignee, except on the day for the first examination, will place the creditors under great disadvantages.

Mr. COMMISSIONER PHILLIPS.—Let the creditors and this gentleman you wish appointed creditors' assignee give the official assignee every information and assistance, and I dare say the creditors' interest will not suffer much.

Application refused.

INSOLVENT COURT.

March 2, 1852.

(Before the CHIEF COMMISSIONER.)

*Re DAVID TERRAS.**Notice of opposition.*

The accident of a notice of hearing not coming to the hand of a creditor in consequence of his temporary absence from home, is no ground for waiving the practice of the Court and the provisions of the statute, that a creditor intending to oppose must give due notice of that opposition.

THIS insolvent came up for his hearing, when a creditor in person appeared to oppose.

The CHIEF COMMISSIONER having ascertained that he had not entered notice of his opposition in the book kept in the office for that purpose, and that no other creditor had done so, intimated to the creditor that he could not be allowed to oppose.

The opposing creditor explained that he had been absent from home, and from some accident which he could not explain, the notice of the insolvent's hearing had not come to him so as to enable him to enter notice of his intended opposition in time.

The CHIEF COMMISSIONER said that was not the insolvent's fault. The rule of the Court could not be relaxed under such circumstances.

Opposition disallowed.

INSOLVENT COURT.

March 4, 1852.

(Before the CHIEF COMMISSIONER.)

*Re WILLIAM BUSBY.**Dividend—Principle upon which it proceeds.*

Held, that creditors having received a dividend from a separate fund produced from an insolvent's estate in Scotland, will be excluded from dividend until the other creditors are placed upon an equality with them by having received dividends to the same amount.

THIS was an application in the nature of an appeal from the registrar (Mr. Charles Dance) sitting to receive a proof of debts, by a body of creditors to share in a dividend arising in an insolvency which took place above thirty years ago. The circumstances are somewhat peculiar. The insolvent was discharged in 1822. In 1824 certain heritable creditors in Dumfriesshire (who were also creditors under the insolvency and in the schedule) applied for an order of ranking and sale, and the Court of Session directed that the insolvent's heritable estate should be sold for the benefit of his heritable creditors. An order was made and the estate was sold accordingly. A division of the proceeds took place, and the debts of the heritable creditors were satisfied in full and a surplus left.

The assignee, Mr. Williams, then applied to the Scottish Courts, in his capacity as assignee under the English insolvency of 1822, to be allowed to prove for the whole of the debts in the English schedule. This was refused, the court holding that the English insolvent laws did not extend to Scotland, or at all events did not apply to heritable property in Scotland, which was alone the subject of their inquiry.

Mr. Williams then applied in another capacity—as trust assignee for certain creditors in England. The Scottish Court does not refuse to entertain this new application, but, on the contrary, favours it as a laudable proceeding to save expense, one appearing for several; and the proof was admitted subject to the usual affidavit of debt from each individual creditor. Under this proceeding these creditors received several dividends, amounting in the whole to 8s. 11d. in the pound.

In 1831 a dividend of 6½d. in the pound was made upon the English estate under the insolvency of 1822. The assignee paid

*Re WILLIAM
BUBBY.*

—
1852.

*Dividend—
Principle upon
which it pro-
ceeds.*

that dividend to all the admitted creditors in the schedule, and not to the other disputed creditors.

The insolvent, at the time of his insolvency, deposited certain shares with his assignee, and now, after a lapse of thirty years, the insolvent being dead, and the original assignee also dead, these shares become of value, and a fund is created for further dividend.

Gordon now applied on behalf of those creditors who had received the dividend from the surplus upon the sale of the Scottish heritable property, and after division amongst his heritable creditors, to share a fresh dividend under the insolvency.

The question for the court now was, how those creditors were to be paid on the present occasion; whether they should receive on the whole of their original debts; whether, having deducted the Scotch dividends, they should receive on the balance; or whether they were to be excluded altogether until the other creditors had received a dividend to the amount they had already received, and were, in fact, placed upon an equality with them.

Gordon contended, on the part of those creditors for whom he applied, that they ought to have the full benefit of their superior activity, for all the creditors on the English schedule might equally have gone in and proved in Scotland; and that a precedent existed in bankruptcy where a creditor holding a bill of a bankrupt with other names, might recover from each individual party until they had received 20s. in the pound.

The answer to that was, first, that they had received the full benefit of their superior activity, for they had had a dividend of 8s. 11d. in the pound; whereas those creditors who had neglected to prove in Scotland had received nothing, and if the other scheduled creditors had displayed equal activity, their dividend would have been reduced; and with regard to the precedent in bankruptcy, the holder of a bill only shared equally with all other creditors on the estate of the bankrupt, the remainder being recoverable from other parties on other liabilities. So that upon the argument of their own attorney they had no right to receive more until placed upon an equality.

Gordon submitted that the estate in Scotland was not under the jurisdiction of the court, and therefore not the same estate. The court should deduct from their debts the amount they had received in Scotland, and allow them to prove for the remainder.

Mr. Dance (registrar) said that it was the same estate throughout, and if the assignee had used due diligence, the surplus fund, after the payment of the creditors holding heritable securities, would have been paid into this court.

The CHIEF COMMISSIONER.—The enlarged view of the case is that all creditors should benefit alike.

Mr. Dance.—Mr. Gordon's proposition would enable him to prove one-half the amount of their debts in the schedule; but the principle of damaging the other creditors would be the same.

The CHIEF COMMISSIONER.—Receiving in that kind of way more than the other creditors, who did not prove in Scotland. I

think the application must be refused until the other creditors can come in *pari passu* with themselves. *Re WILLIAM BUSBY.*

Application refused.

1853

*Dividend—
Principle upon
which it pro-
ceeds.*

INSOLVENT COURT.

March 6, 1852.

(Before Mr. COMMISSIONER PHILLIPS.)

Re ALFRED PARR.

Disallowance of opposition.

Held, that a creditor who intimates his intention to oppose unless an arrangement was made with him by the debtor, will not be allowed to oppose.

THIS insolvent came up for his hearing, when a creditor named Benyon appeared to oppose.

Cooke, who supported the insolvent, put the following question to the creditor:—"Did you not write to the insolvent, telling him, that unless he made some satisfactory arrangement you would oppose him?

Mr. Benyon.—I did.

Cooke.—Then you cannot oppose.

Mr. COMMISSIONER PHILLIPS (to the creditor).—You have no right to try to secure yourself at the expense of others; if you do you cannot oppose, and that has been the tenor of the decisions of this court for the last thirty years.

Mr. Benyon.—But the insolvent was acting as my agent.

Mr. COMMISSIONER PHILLIPS.—That makes no difference.

Opposition disallowed.

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ACCOMMODATION BILLS.

An insolvent, accepting accommodation bills, when unable to meet his own engagements, ordinarily contracts a debt without reasonable expectations of payment. *Re Sorrell*, 139

Accepting an accommodation bill at a time when the acceptor is unable to pay his debts contracted for valuable consideration, is contracting a debt without probable expectation of paying the same; and allowing the principal who received money for the bill to sell his chattels and leave the country, without informing the parties who discounted the bill, will be deemed evidence of an original fraudulent intention. *Re Allen*, 189

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A. B. having petitioned the Insolvent Court, his discharge was opposed by the plaintiff on the ground of fraud, which opposition he agreed to withdraw, on being paid his demand in full; and, accordingly, having received a bill of exchange for the amount drawn by the insolvent upon and accepted by the defendant, he withdrew his opposition:

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The assets of the estate of a deceased insolvent

being paid into court, are claimed by the administratrix and next-of-kin, who offer one-third to the creditors. The assignees claim payment in full. How are the assets to be apportioned? *Re Hooker*, 55

The assets of the estate of a deceased insolvent being paid into court, are claimed by the administratrix and next-of-kin, who offer one-third to the creditors. The assignees claim payment in full. How are the assets to be apportioned?

Semblé, the creditors cannot claim payment of their unsatisfied debts where judgment has not been entered up before the death of the insolvent. *Re Hooker*, 61

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Held, that if the assignee exercises the same care of the trust property as he would

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A debt due by a pay-clerk of the Board of Works in Ireland is a debt due to the Crown, and in case of his insolvency he cannot be admitted to bail without the consent of three

of the Commissioners of Her Majesty's Treasury for the time being, certified under their hands, pursuant to the 3 & 4 Vict. c. 107, s. 92 (English analogous, 1 & 2 Vict. c. 110, s. 103). *Re Flynn*, 167

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The 61st section of the Insolvent Debtors Act applies only to conditional bills of sale.

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Held (on general demurrer to a plea), that such cause of action did not pass to the plaintiff's assignees by the vesting order under 1 & 2 Vict. c. 110.

The second count charged negligence in setting aside a *sequestrari facias* which had been issued against the plaintiff's living, by reason whereof the writ remained in force longer than it otherwise would have done, whereby the plaintiff lost the rents, &c.; but it did not aver any other damage.

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A verdict was returned for the plaintiff.

Held, that the Master was right in allowing the plaintiff the costs of impeaching the bill of sale. That the 61st section of the 1 & 2 Vict. c. 110, does not apply to an absolute bill of sale, but only to a conditional bill of sale, and that therefore the plaintiff was entitled to give evidence of the fraudulent nature of this document. *Harding (assignee,) v. Tingey*, 184

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A protection for a limited time, granted by the Insolvent Court, is not a bar to proceedings in the County Court. *Brock v. Yarnold*, 179

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A., an insolvent debtor, received his current pay as a warrant officer between the date of his vesting order and his discharge under the 1 & 2 Vict. c. 110, and spent the whole in the support of himself and his children:

It was held by the judge of the County Court that A. was not entitled to his discharge until the whole sum so expended was paid to the official assignee for the creditors.

Held, that this cannot alter or amend the adjudication of the judge of the County Court. *Re Down*, 248

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The court, in delaying the discharge of an insolvent in custody for damages in an action for seduction, will be guided solely by the amount of the damages and the situation in life of the parties. Circumstances of aggravation or extenuation are for the consideration of the jury at the trial. *Re Howard*, 296

DEBTS (AMOUNT OF).

Debts included in schedules under the Protection Statutes must be included in estimating the amount of a trader-debtor's liabilities upon subsequent applications to the court under these statutes, and if together they

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An insolvent, detained in prison after the period of his remand has expired, at the suit of a creditor whose detainer was lodged subsequently to the hearing, and whose debt is inserted in the schedule, will, on application to that effect, be discharged by the court. *Re Dillon*, the younger, 118

DISCHARGE.

A prisoner for debt applies for leave to come up for a hearing under the 7 & 8 Vict. c. 96; but it appearing that he had fraudulently assigned property to his brother-in-law, the application is refused.

Query, as no assignee is, or can be, appointed, and the petition remains on the files of the court, how is the property fraudulently assigned to be reached by the creditors?

A rule *nisi* will be granted upon the insolvent to show cause why his petition should not be taken off the files of the court, upon which, no cause being shown, the petition will be dismissed. The creditor will then be at liberty to file a creditor's petition, under the 1 & 2 Vict. c. 110. *Re Brenning*, 95

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Where the case of an insolvent has been fully heard and is postponed to the following day, with a view to give judgment, which the court intimates will be adverse, and in the meantime the insolvent settles with his detaining creditor, and is discharged out of custody, the court has no jurisdiction over him.

Quare, are his bail discharged? *Re Shine*, 162

In the year 1847 defendant was taken in execution, and in July, 1849, the plaintiff died in insolvent circumstances. On the 19th February, 1850, the plaintiff's will was proved, his widow being executrix. In the following August the widow died intestate and without issue; and though a diligent search had been made, no personal representative or next-of-kin could be found. The court declined granting a rule for the defendant's discharge, but acceded to a proposal of the defendant that the case should be referred to the Master to inquire into and report upon it at the defendant's expense, power being given him to advertise for next-of-kin. *Ridsdale v. Latour*, 197

Quære, does the discharge of a debtor in execution by the plaintiff operate as a satisfaction of the debt, so as to disable the plaintiff from proving for a dividend made under a creditor's petition, filed previous to the discharge, and under which no schedule had been filed?

Held, that a discharge of the debtor before adjudication is satisfaction; but that after adjudication it is not. *Re Gooding*, 220
Defendant being indebted to plaintiff assigned to him, by deed of mortgage, three policies of assurance on defendant's life, and covenanted to pay the annual premiums, and if he did not, and plaintiff paid them, to repay plaintiff. Defendant afterwards became insolvent, and was discharged under the Insolvent Debtors Act. A premium accrued due after the discharge, and being unpaid by the defendant, and plaintiff having paid it, and not been repaid:

Held, that defendant was not discharged from liability for these breaches of covenant by his discharge from the original debt under the statute 1 & 2 Vict. c. 110. *Russell v. Smith*, 224

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Held, that creditors may oppose a petitioner's application for a discharge *ad interim* upon the grounds of opposition enumerated in section 24 of the 7 & 8 Vict. c. 96, and that the court will act upon these grounds of opposition there enumerated, not only upon "the day for the first examination," but also upon the preliminary application in the case of prisoners for a discharge *ad interim*. *Re Mansell*, 219

Creditors may oppose a petitioner's application for a discharge *ad interim*, upon the grounds of opposition enumerated in section 24 of the 7 & 8 Vict. c. 96, and the court will act upon these grounds of opposition there enumerated, not only upon "the day from the first examination" but also upon the preliminary application in the case of prisoners for a discharge *ad interim*. *Re Mansell*, 246

A petitioner who is in custody, and applies for his discharge *ad interim*, under the 7 & 8 Vict. c. 96, s. 6, will not be discharged unless he is "a prisoner in execution upon a judgment obtained in an action for the recovery of a debt." *Re Bell*, 293

DIVIDEND.

The general rule upon declaration of dividend and proof of debts is that creditors holding securities from the debtor alone shall not prove unless the security be given up or its value ascertained by sale, so that the creditor may prove for the difference; but the court will, under peculiar circumstances, and upon sufficient cause shown, where the amount of the creditor's debt is very considerable, stay the dividend, direct the creditor's security to be estimated at its maximum value, and allow him to prove for the difference, he undertaking that, if the security is ultimately sold for more than the estimated maximum value, the surplus should be paid to the assignees. *Re Edward Bell*, 233

Held, that creditors having received a dividend from a separate fund produced from an insolvent's estate in Scotland, will be excluded from dividend until the other creditors are placed upon an equality with them by having received dividends to the same amount. *Re Busby*, 317

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A petitioner, who has assigned his property to trustees for creditors within three months prior to the date of his petition, must pay the full value of it into court or the petition will be dismissed. *Re Merrall*, 115

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It was necessary to allege in a plea in bar under the general form given in the 10th section of the 5 & 6 Vict. c. 116, that the debt sued for accrued before the filing of the petition; but now a plea in bar, in order to be good under that section, as modified by the subsequent act (7 & 8 Vict. c. 96) should allege not only that the debt accrued before the filing of the petition, but also that it was named in the schedule. *Phillips and Another v. Pickford*, 169

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An insolvent had been discharged by the Insolvent Debtors' Court upon several occa-

sions. Property was realized under one of the schedules.

Held, that the assets were to be applied in discharge of the claims of all the creditors in all the schedules. *Re Johns*, 13

The petition of a trader debtor cannot be sustained, if his unpaid debts under a former insolvency are not inserted in his present schedule. *Re Bohn*, 28

The debts under a former insolvency not having been inserted in this insolvent's schedule.

Held, that the case may be adjourned to be amended by inserting the old debts, and that the costs so occasioned should be paid by the attorney.

Held, that a coffee-house keeper is a trader, *eo nomine*, within the meaning of the bankrupt laws.

Semble, a man may be a trader independently of the amount of debt contracted with one or more persons while in trade. *Re Cloyd*, 98

Held, that the debts in schedules, filed under the provisions of the 1 & 2 Vict. c. 110 will be excluded in estimating the liabilities of a petitioner upon a subsequent application to the court for protection under the 5 & 6 Vict. c. 116, the 7 & 8 Vict. c. 96, and the 10 & 11 Vict. c. 102.

Held, also, that the effect of granting a protection and a final order to a petitioner, under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, is to place him with respect to property, in the same condition as an uncertificated bankrupt.

Held, also, that the fiat against an uncertificated bankrupt is invalid.

Held, also, that as the Protection Statutes are to be construed by analogy to the law of bankruptcy, except where otherwise expressed, a second protection and final order would be void in law if granted, and that, consequently, second petitions under these acts will not be received. *Re Hance and Roby*, 120

FRIENDLY ARRESTS.

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The court will sanction a friendly arrest where the object of the insolvent is to prevent expense, and make an equitable distribution of his property amongst his creditors. *Re Rev. J. Courtenay*, 163

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HABEAS CORPUS.

A prisoner under the Insolvent Debtors Act, 1 & 2 Vict. c. 110, s. 76, was ordered by the commissioner to be discharged in respect of all his debts except four, at the end of six months; and under sect. 78 of the same statute, he was ordered to be discharged at the end of sixteen months in respect of the four excepted debts:

Held, that whether the commissioner had or had not power to adjudicate a further imprisonment under the 78th section, still he had not released the prisoner as to the four excepted debts, and therefore as the detainers with respect to them remained in force, this court could not discharge him. *Ex parte Violett*, 199

Case against the keeper of the Queen's Prison for not having the body of a debtor before the court, pursuant to a habeas corpus ad satisfaciendum. Plea, not guilty by statute. A debtor in the custody of the defendant petitioned the Insolvent Court for his discharge under 1 & 2 Vict. c. 110. s. 35. The vesting order was made on the 7th January. On the 27th March the plaintiff sued out a habeas corpus ad satisfaciendum, returnable on the 12th April. On the 8th April the petition came on for hearing, and an order was made for the insolvent's discharge; and on the same day a warrant of discharge was made directing that, as to plaintiff's debt, he should be discharged as soon as he should have been in custody for three months, to be computed from the date of the vesting order, 7th January, which time had then expired, and he was accordingly discharged. The defendant on the 15th April returned to the writ of habeas corpus, that the debtor was discharged by a warrant of the Insolvent Court:

Held, that defendant might plead "not

guilty by statute," and give the act and the special matter in evidence, under 1 & 2 Vict. c. 110, s. 110.

That the warrant, although ungrammatically expressed, was not void, but meant that the debtor should be discharged forthwith.

That the defendant was bound to discharge the debtor, and had no authority to enforce his presence on a future day, so as to produce him at the time of the *habeas corpus*, and, therefore, that his return to that writ was good. *Harvey v. Hudson*, 186

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IMPRISONMENT.

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A prisoner attending upon a *habeas corpus ad testificandum* to give evidence in a cause in another court, after which he forthwith returns to the gaol, is not precluded thereby from taking the benefit of the Act of Parliament. *Re Ings*, 84

By the 7 & 8 Vict. c. 96, c. 28, it is enacted "that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition."

The Insolvent Debtors' Court refusing to discharge an insolvent petitioner who had been in custody more than twelve months:

Held, by Williams, J., after consulting Parke, B., that a judge at chambers may discharge him. *Turner and another v. Wilks*, 211

By the 7 & 8 Vict. c. 96, s. 28, it is enacted, "that no debtor shall be imprisoned on any process for more than twelve calendar months for any debt contracted before filing his petition."

The Insolvent Debtors' Court refusing to discharge an insolvent petitioner who had been in custody more than twelve months:

Held, by Williams, J., after consulting Parke, B., that a judge at chambers may discharge him. *Turner v. Wilks and another*, 250

INFANTS.

The petition of a minor cannot be entertained by the court. *Re Andrews*, 92

INTERIM ORDER.

Insolvent was in custody for costs in an action of ejectment brought by himself:

Held, that the court may grant an interim order, although it will not discharge him from custody. *Re Cozens*, 113

IRISH INSOLVENT DEBTORS' ACT.

Held, that a discharge under the Irish Insolvent Debtors' Act, 3 & 4 Vict. c. 10, operates as a bar to debts due from the insolvent in Ireland and also in England. *Shepherd v. George de la Poer Beresford*, Bart. 251

Held, that a discharge under the Irish Insolvent Debtors Act, 3 & 4 Vict. c. 107, operates as a bar to debts due from the insolvent in Ireland, and also in England. *Longbottom v. Stokes*, 259

JURISDICTION.

The Court for Relief of Insolvent Debtors in London has no power to direct the re-hearing or re-examination of an insolvent. *Re Keene*, 107

The court will not take notice of service on French creditors. *Re Brie*, 258

LIMITATIONS (STATUTE OF.)

One of three makers of a joint and several promissory note having become insolvent, the name of the plaintiff as holder was duly inserted in his schedule, and a dividend was subsequently paid to him by the assignee of the insolvent in respect of the note.

Held, that this was not a part payment to take the case out of the Statute of Limitation as against the other makers. *Davies v. Edwards and another*, 260

OPPOSITION.

An accidental mistake in entering notice of opposition in the office book, as to the day upon which it is intended to be made, is fatal. *Re Martin*, 42

Creditors who have given due notice of their intention to oppose are not precluded from stating the grounds of their complaint before the adjudication is pronounced. *Re Argent*, 43

In opposition by traders against insolvents for contracting debts with them by false representations, under 1 & 2 Vict. c. 110, it is not absolutely necessary in all cases that the principals should attend to make out their case. *Re M'Kenzie*, 73

An opposition to the discharge of a prisoner upon the ground that he has given an undue preference to a creditor will fail, unless it be shown that it affected the creditors

generally, by diminishing the sum to divide amongst them. *Re Nightingale*, 93

A creditor who has sought a preference for himself, will not be allowed to oppose. *Re Francis*, 94

Incorporation associations must oppose by an authority under the seal of the corporation.

Notice of opposition properly entered in the office by the agent or solicitor of a corporation need not be under seal if the act is properly ratified by the company previous to the hearing of the opposition. *Re Moorcock*, 118.

Where creditors insert an advertisement in a newspaper, calling a meeting, with a view to get up and organize a general opposition to an insolvent's discharge, although there are good grounds of remand, the court will not be influenced by the opposition of such creditors, and the insolvent will be discharged. *Re Clemenger*, 267

A contract whereby the friend of an insolvent promises to pay a creditor a sum of money in consideration of the creditor's offering no opposition to the discharge of the insolvent is founded on an illegal consideration, and is against the policy of the Insolvent Act, and therefore void. *Hall v. Dyson*, 284

The allowance of costs of opposition in individual cases of opposition, under the 1 & 2 Vict. c. 110, is the exception and not the general rule of practice. *Re Fisher*, 298

The accident of a notice of hearing not coming to the hand of a creditor in consequence of his temporary absence from home, is no ground for waiving the practice of the court and the provisions of the statute, that a creditor intending to oppose must give due notice of that opposition. *Re Terras*, 316

Held, that a creditor who intimates his intention to oppose unless an arrangement was made with him by the debtor, will not be allowed to oppose. *Re Parr*, 310

PETITION.

A sum less than that filled up in the blank left in the petition for the insertion of the necessary expense of petitioning the court having been paid to the insolvent's attorney, can the petition be sustained?

Held, that if the mistake does not appear to have been wilful, or for the purpose of deceiving the court, the petition will not be dismissed. *Re Lawes*, 37

Held, that an omission to fill up the blank left in the petition for stating the day on which it was signed by the petitioner is fatal. *Re Glover*, 45

The petition of an insolvent within the jurisdiction of the court will not be sustained if he has not been a resident for six months next immediately preceding the date of his application. *Re Snook*, 46

If the petition is not signed by an attorney it will be dismissed.

If the places in which an insolvent has resided for six months previous to filing his petition are not filled up in the blank left for that purpose, the petition will be dismissed. *Re Marsh*, 47

The petition of insolvent contained an allegation that he had not parted with any property not contained within the exceptions named in the statute, during the three months preceding the date of his petition; but this statement having been proved to be untrue, held, that the court will either dismiss the petition or name no day for a final order. *Re Collier*, 74

An insolvent must describe himself in his petition by all the names in which he has contracted debts. *Re Harris*, 105

Where one judgment creditor had been allowed to sweep off a petitioner's property, and he subsequently petitioned for protection:

Held, that he had not complied with the condition mentioned in the act, but had chosen to wait until his estate was gone, and was therefore not a person entitled to the benefit of the statute. *Re Bromley*, 110

If all the names in which an insolvent has contracted debts be not set forth in his petition, it will be dismissed. *Re Williams*, 138

The omission to fill up the blank left in the petition for stating the sum paid to the attorney is fatal.

Parting with property on the eve of petitioning, which is unaccounted for in the schedule, is also fatal. *Re Wilson*, 140.

All the names in which an insolvent has contracted debts must be set forth in his petition. *Re Edwards*, 201

The petition must be in the form prescribed by the act, or it will be dismissed.

There is no power to amend the petition. *Harmsworth*, 212

An erroneous decision in point of law, as the misconstruction of an act of Parliament, is not a sufficient ground for issuing a prohibition to the judge of an inferior court, even though his jurisdiction to deal with the case may depend upon that decision, when another immediate remedy is open to the applicant. Where, therefore, a County Court judge decided that an insolvent trader owed debts to a less amount than 300*l.*, although if his debts under a former petition were added to his present debts the amount would exceed 300*l.*, the court—

Held, that even if the judge were wrong in excluding the former debts from the calculation, they ought not to interfere by prohibition, as the applicant, who was a judgment-

creditor, might enforce his judgment if the County Court judge proceeded without jurisdiction.

Quære, whether under 5 & 6 Vict. c. 116, upon a petition by an insolvent trader for protection from process in ascertaining whether the debts are less than 300*l.*, the judge ought to take into calculation the debts still unpaid, from which the petitioner had some years before obtained a final order of protection. *Re Tamerlane v. Bowen*, 237

The court will not allow the process of discharge under the 1 & 2 Vict. c. 110, to be employed for defeating an adverse adjudication pronounced against the petitioner under the Protection Acts.

Changing a claim at the date of a petition from a judgment for costs into a judgment for debt by fresh process pending adjournment does not disable the court from granting protection and discharge in respect thereof under the 28th section of 7 & 8 Vict. c. 96.

R. obtained judgment against S. in an action for the infringement of copyright, the judgment being composed of damages and S. becoming insolvent, has his final order adjourned sine die in respect thereof. An application for protection under the 28th section was enlarged generally upon the same ground. Pending this adjournment, R. brought an action upon his judgment for costs, which then became a judgment debt, for which S. was arrested, and committed to prison. Subsequent detainees having been lodged against him, he obtained leave to file a petition, under the 1 & 2 Vict. 110, but, upon the hearing, the court refused to adjudicate upon the new schedule until the debt belonging to the previous schedule was expunged.

Quære—Does a judgment for costs in an action due at the date of filing a petition under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, upon an adjournment sine die, escape from the protecting power of the court, under the 7 & 8 Vict. c. 96, s. 28, by becoming upon fresh process in respect thereof a judgment debt?

Held, that the change in the nature of a judgment arising from the same claim will not affect the power of the court to protect and discharge under the 28th section. *Re Smith*, 239

An insolvent filed a petition under the Protection Acts, but did not come up for his first examination.

Held, that as the petition, under the 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, had not been dismissed, a petition subsequently filed under the 1 & 2 Vict. c. 110, could not be sustained. *Re Newman*, 295

PLAINTIFFS IN CUSTODY.

A plaintiff in an action for slander, in custody for the costs, applying for relief under the Protection Statutes, will have no day named for his final order. *Re Miller*, 35

PRACTICE.

An insolvent having been sworn, the Court will not permit his case to be re-opened by an opposing creditor. *Re Syer*, 85

PROOF OF DEBT.

Where A. became insolvent in the year 1836, and inserted the debt of B. in his schedule:

Held, that B. might prove for the debt under the subsequent bankruptcy of A. in 1842, and that his right to prove was not barred by the Statute of Limitation. *Re Lyon*, 33

An order is made by the court for creditors to prove their debts preparatory to a dividend. Certain creditors do not appear when summoned in the usual way. The auditor is justified in omitting their names from his report. He is justified also in omitting all calculations for interest on specialty debts. Interest is not allowed beyond the date of the petition. *Re Hooker*, 59

A bill of exchange for 700*l.* purporting to bear the drawer's name in Hamburgh (although there was no evidence to that effect), filled up and accepted in London, will not be received in proof of a creditor's debt. *Re Lonergan*, 91

A creditor omitted from the schedule may be admitted to prove upon notice of dividend.

The Statute of Limitations nor an lapse of time will affect such creditor's right to prove against the estate of insolvent. *Re Lewis*, 137

PROPERTY AFTER-ACQUIRED.

P., a tradesman in business, borrowed of T. the sum of 150*l.*, giving as security a paper writing as follows:—"I, Edmund P., owe Daniel T. the sum of 150*l.*, being money borrowed, and for which I hereby agree to pay interest at 5 per cent. to be paid by me at the end of six months from the present date, and to be further regularly paid at the expiration of each successive period of six months as it may become due from time to time, and until the said principal sum of 150*l.* shall be repaid by me the said D. T.; and as a security for the repayment of the said 150*l.*, together with all arrears of interest which may become due, I hereby authorize and empower the said D. T. to take and hold possession of all or any household goods, shop fixtures, stock-in-trade, &c., in my

house, situate, &c., and in the event of my failing to repay him the principal sum above mentioned, with interest thereon, then and in that case I hereby agree that the said D. T. shall sell and dispose of all my household furniture, shop fixtures, &c., in my house as aforesaid, and to appropriate the proceeds of the sale thereof, after deducting the expenses of such sale, to repay himself the said principal sum and interest." T. brought an action for the money lent, P. confessed judgment, and the sheriff, seven months after the date of the above set-out paper writing, seized and sold all the goods he found on the premises. A few days afterwards P. petitioned the Insolvent Court, and a vesting order was duly made. The assignee brought this action to recover the amount received by T. for such goods as were not on the premises, at the date when the paper writing was made, but acquired by the insolvent subsequently:

Held that, under this paper writing or agreement, the defendant was only entitled to the proceeds of such goods and effects as were on the premises on the day when the agreement was made. *Spurgeon (assignee) v. Taylor*, 192

PROPERTY PASSING TO ASSIGNEES.

The annuity awarded as a compensation to a Commissioner of Bankrupts, whose duties were abolished by the 5 & 6 Vict. c. 122, passes to his assignee on his insolvency, and is not within the excepted cases mentioned in 1 & 2 Vict. c. 110, s. 56.

Where such an officer, having become insolvent, refused to make the affidavit (required by the order for the payment of the annuity) that he has not held and does not hold any office of emolument, &c., the court allowed other evidence to be given of that fact, to enable the assignee to receive the annuity.

Such an officer is not in the service of Her Majesty, within the meaning of the 56th section of the 1 & 2 Vict. c. 110. *Spooner v. Payne*, 299

PROPERTY (PARTING WITH.)

N. and C. executed a bill of sale by way of mortgage, dated July 29th, 1851, which provided for the redemption of the goods and chattels mentioned by quarterly payments of 25*l.*; the first quarterly payment to be made on 25th December, 1851, and in default of that or succeeding payments that the mortgagee should have the power of seizure and sale.

Default being made in the payment of the

first quarterly instalment, the mortgagee seized and sold.

N. and C. filed petitions under the Protection Acts on the 4th of February, 1852, and the seizure and sale of the property mentioned in the mortgage with the bill of sale annexed, by the mortgagee, having been made within the three months preceding the date of the petition:

Held, that the property was parted with at the date of the execution of the deed, and therefore that this was not a charging or parting with property within three months of the petition by the insolvent. *Re Nash and Chappel*, 311

RENT.

Rent due to a landlord excluded in construing the word "unincumbered" in the allegations in the petition respecting an insolvent's estate. *Re Mewburn*, 2

RESCINDING ADJUDICATION.

No day having been named for a final order, but permission being given to the insolvent to apply at the expiration of six months, the court will not alter its judgment, although the opposing creditor should be paid and the opposition withdrawn. *Re Patey*, 136

SALE.

The provisional assignee may sell real estate vested in him, if the court shall so direct.

The court will permit real estate to be disposed of by private contract when an attempt has been made to sell it by public auction and it has failed. *Re White*, 102

Although the Insolvent Debtors Act (7 Geo. 4, c. 57, s. 20,) directs the assignees to sell the insolvent's real estates by auction, yet if they have tried to sell them by auction and failed, a sale by private contract will be good. *Mather v. Priestman*, 103

SCHEDULE (DEBT IN.)

If an insolvent neglects to plead his discharge in bar to an action brought against him in respect to a debt inserted in his schedule, it is his own default, and if he is arrested this court will not interfere to liberate him from prison.

If an insolvent be detained by a creditor at whose suit he has been remanded, after the period of remand has expired, this court will not order his discharge. *Re Smith*, 49

SCHEDULE.

An insolvent who has scheduled a debt of more than 5*l.* as being less than 5*l.* is still liable to his creditor for the amount, and if he has

come into property since his insolvency, the court will order immediate payment. *Emerson v. King*, 178

Upon the refusal of an insolvent to file a schedule upon the presentation of a creditor's petition, the court, notwithstanding, may proceed to set aside a portion of half-pay for the benefit of his creditors. *Re Tolson*, 290

SECOND PETITION.

Held, that the effect of granting a protection and a final order to a petitioner, under the statutes 5 & 6 Vict. c. 116, and 7 & 8 Vict. c. 96, is to place him, with respect to property, in the same condition as an uncertificated bankrupt.

Held, also, that as a fiat against an uncertificated bankrupt is invalid, and as the Protection Statutes are to be construed by analogy to the law of bankruptcy, except where otherwise expressed, a second protection and final order would be void in law if granted, and that, consequently, second petitions under these acts will not be received. *Re Hance*, 141

SMALL DEBTS ACT.

An insolvent is liable for a debt, or any portion of a debt, omitted from his schedule, and a discharge or a final order will be no bar to proceedings against him in respect thereof, under the 8 & 9 Vict. c. 127. *Alard v. Boss*, 40

A final order is no protection against an order of commitment under the 8 & 9 Vict. c. 127, made before the filing of an insolvent's petition. *Re French*, 97

TRADER.

A lodging-house keeper and chimney-sweep is not a trader *eo nomine* within the meaning of the laws relating to bankrupts. *Re Coots*, 44

TRADER DEBTOR.

Set-offs are allowable in diminution of the total amount of the debts of a trader debtor, to bring him within the operation of the statute 7 & 8 Vict. c. 96. *Re Spink*, 6

All debts must be reckoned in the amount of a trader's liabilities, although the petitioner

may expect that a particular creditor will not press for the payment of his debts. *Re Davison*, 135

When there is a claim outstanding against an estate, the court is unwilling to annul the vesting order. *Re Adams*, 67.

VESTING ORDER.

The discharge of an insolvent from custody by his detaining creditor, without adjudication, while it withdraws his person from the jurisdiction of the court, does not divest the property passing under the vesting order, nor operate to annul the vesting order, or interfere with its past effects, but for these purposes it is necessary that the petition should be dismissed by the court. *Re Mander*, 268

VEXATIOUS DEFENCE.

In adjudging a remand for the vexatious defence of an action, the court will take into consideration that a form of action less expensive than that chosen might have been selected.

Practice as to allowing the costs of oppositions under statute 1 & 2 Vict. c. 110. *Re Halfacre*, 10

In oppositions for vexatiously defending actions, as the expense constitutes the offence, the bill of costs and the master's allocatur must be produced. *Re Wall*, 11.

A petitioner under the Protection Statutes having defended an action vexatiously will have no day named for his final order. *Re Foster*, 82

An opposition for vexatiously defending an action fails if the verdict is for a sum less than that claimed by the plaintiff in his particulars of demand. *Re Stacey*, 83

A taxed bill of costs must be produced to enable the court to pronounce a remand for the vexatious defence of an action.

Every business which an insolvent has carried on must be mentioned in his description. *Re Ranney*, 106

Where an insolvent's attorney pleaded to gain time:

Held, that the insolvent is responsible for the extra costs occasioned by the vexatious defence. *Re Parsons*, 247

E. G. A. A.

